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Case No. 85-835

Supreme Court, U.S.
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SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1985

CORRECTED COPY

CHESTER LINDEN MORTON,
PETITIONER

vs.

PEOPLE OF THE STATE OF CALIFORNIA,
RESPONDENT

ON WRIT OF CERTIORARI
TO THE STATE OF CALIFORNIA
COURT OF APPEAL,
FOURTH APPELLATE DISTRICT,
DIVISION TWO

# PETITION FOR WRIT OF CERTIORARI

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# QUESTIONS PRESENTED FOR REVIEW

**Section One: The Crestline Search Warrant (August 3, 1981)**

I DID THE TRIAL COURT PROPERLY DECIDE ISSUES OF FACTUAL INACCURACIES ALLEGEDLY CONTAINED WITHIN THE AFFIDAVIT IN SUPPORT OF THE SEARCH WARRANT?

II WERE THE AFFIANT'S OBSERVATIONS FROM THE REAR DECK OF THE RESIDENCE THE "FRUITS" OF A CONFIRMATORY (WARRANTLESS) SEARCH?

III WERE THE AFFIANT'S OBSERVATIONS FROM THE REAR DECK OF THE RESIDENCE MADE IN VIOLATION OF PETITIONER'S REASONABLE EXPECTATION OF PRIVACY?

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**Section Two: The 28th Street Search Warrant (August 4, 1981)**

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VI DID THE AFFIDAVIT CONTAIN ALLEGATIONS OF FACT WHICH WERE "FRUIT OF THE POISONOUS TREE?"

**Section Three: The 28th Street Search Warrant (December 14, 1981)**

VII DID THE AFFIDAVIT CONTAIN SUFFICIENT FACTUAL ALLEGATIONS TO SUPPORT A FINDING OF PROBABLE CAUSE?

A. DID THE AFFIDAVIT CONTAIN ALLEGATIONS OF FACT WHICH WERE STALE?

B. DID THE INFORMANT INFORMATION WITHIN THE AFFIDAVIT SATISFY THE AGUILAR-SPINELLI "TWO-PRONGED" TEST?

C. WERE THE FACTUAL ALLEGATIONS WITHIN THE AFFIDAVIT REGARDING BEHAVIOR OF PERSONS INVOLVED WITH THE ILLEGAL DRUG TRADE SUPPORTED BY CURRENT RELEVANT FACTS REGARDING PETITIONER?

VIII DID THE OFFICERS SERVING THE SEARCH WARRANT EXCEED THE PERMISSIBLE SCOPE OF THE SEARCH WHEN THEY SEIZED PROPERTY THAT WAS NOT SPECIFIED IN THE SEARCH WARRANT?

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Designations:

C.T., I = CLERKS TRANSCRIPT ON APPEAL, VOLUME ONE

C.T., II = CLERKS TRANSCRIPT ON APPEAL, VOLUME TWO

R.T., I = REPORTERS TRANSCRIPT ON APPEAL, VOLUME ONE

R.T., II = REPORTERS TRANSCRIPT ON APPEAL, VOLUME TWO

R.T., FEB. = REPORTERS TRANSCRIPT ON APPEAL, FEBRUARY 23, 1983 (TESTIMONY OF DR. JAMES SIMS, UNIVERSITY OF CALIFORNIA AT RIVERSIDE).

O.B. = APPELLANTS OPENING BRIEF ON APPEAL FILED WITH THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION TWO.

* THE PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED BY WAY OF THIS PETITION WERE CHESTER LINDEN MORTON, PETITIONER, AND THERESA MARIE QUESADA, WHO IS NOT A PARTY HEREIN.

# TABLE OF AUTHORITIES*

*CASES*

*Aguilar v. Texas*, 378 U.S. 101 (1964)
*Beck v. Ohio*, 379 U.S. 89 (1964)
*Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971)
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*People v. Defore*, 242 NY 13, 21 (1926)
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* THERE IS NO OFFICIAL OR UNOFFICIAL REPORTER'S CITATION GIVEN TO THE OPINION FROM WHICH A WRIT OF CERTIORARI IS SOUGHT BY THIS PETITIONER.

## GROUNDS FOR JURISDICTION

The judgment sought to be reviewed by way of this Petition was issued by the Court of Appeal, Fourth Appellate District, Division Two, State of California. Said Opinion was filed on May 16, 1985. (Please see Appendix A for a copy of said Opinion.) A Petition for Review was filed on July 1, 1985 with the Clerk of the Supreme Court of the State of California. Said review was denied on August 28, 1985. The judgment of the Court of Appeal was, therefore, entered on August 30, 1985.

An Order Granting an Extension of Time was issued by the Honorable Justice Stevens on October 25, 1985, granting Petitioner until November 12, 1985 to file this Petition for a Writ of Certiorari.

Your Petitioner relies upon the provisions of *Rules of the Supreme Court, Rule 17.1.(c)* conferring on this Court jurisdiction to review, by Writ of Certiorari, the judgment entered by the Court of Appeal, Fourth Appellate District, Division Two, State of California. Specifically, your Petitioner submits that a State Court has decided Federal questions in ways which are in conflict with applicable decisions of this Court.

This case involves issues of search and seizure and this Honorable Court's decisions related thereto, and based upon the Fourth Amendment to the United States Constitution, which provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV.

## STATEMENT OF THE CASE

Chester Linden Morton, hereby petitions this Honorable Court for a Writ of Certiorari from that judgment of the Court of Appeal, Fourth Appellate District, Division Two, State of California, entered on August 30, 1985, affirming the convictions of your Petitioner for having committed criminal acts, prohibited by the California Penal Code, and the California Health and Safety Code. (Please see Appendix B for a recitation of "Proceedings Below").

At Trial Court, and upon appeal, by way of written and oral argument, Petitioner challenged the validity of three (3) search warrants, arguing both state and federal grounds. All argument presented herein has been litigated at Trial Court and upon appeal, in the manner above-stated.

The within criminal prosecutions have their beginnings with the

search of the residence located at 24601 Lake Gregory Drive, in Crestline, County of San Bernardino, State of California, on August 3, 1981. Said search was conducted pursuant to a Search Warrant issued by the HONORABLE DAVID PRESS, Judge of the Crest Forest Judicial District. Said warrant was issued based upon the Affidavit of DETECTIVE RAYMOND RUCKER of the San Bernardino County Sheriff's Office, Select Investigations Division.

Upon serving the subject Search Warrant, the Affiant, along with other San Bernardino County Sheriff's Office personnel, found what has been alleged to be a clandestine laboratory established for the purpose of manufacturing (sic) methamphetamine.

On August 4, 1981, DETECTIVE DONALD G. HANKERSON of the San Bernardino County Sheriff's Office, Select Investigations Division, executed an Affidavit in Support of the Search Warrant requesting authorization to search the residence located at 1799 West 28th Street, in the City of San Bernardino, County of San Bernardino, State of California. Relying primarily on evidence seized pursuant to the August 3, 1981 Search, DETECTIVE HANKERSON submitted his Affidavit to the HONORABLE CARL DAVIS, Judge of the Municipal Court, East Valley Division, County of San Bernardino, who issued the requested Search Warrant, which was served by the Affiant on the same date.

On December 14, 1981, DETECTIVE LOUIS F. PERRY of the San Bernardino County Sheriff's Office, Select Investigations Division, executed an Affidavit in Support of the Search Warrant requesting authorization to search the 28th Street residence, a second time.

The Affiant submitted his Affidavit to the HONORABLE DAN L. RANKINS, Judge of the Municipal Court, Central Division, County of San Bernardino, who issued the warrant the same day. The Affiant, along with other San Bernardino County Sheriff's Office personnel, served the subject warrant on said date.

On or about September 24, 1981, DETECTIVE LOUIS F. PERRY (as above-described) conducted an interview with Petitioner at the offices of the San Bernardino County Sheriff. Detective Perry telephoned Petitioner and requested that Petitioner submit to such interview. Said interview was tape recorded.

In his Affidavit in Support of the Search Warrant for the December 14, 1981, search of the 28th Street residence, the Affiant alleged, that during the above-described interview Petitioner admitted his involvement in a conspiracy to manufacture and distribute methamphetamine.

The following Arguments contained within this Petition reflect a synopsis of the proceedings in the trial court respecting Petitioner's Motions to Suppress Evidence, and litigation of the same upon appeal.

By way of this Petition, it is contended that each of the challenged Search Warrants should have been quashed upon the grounds more fully specified hereinafter, and the evidence, seized pursuant thereto, suppressed.

Upon this Honorable Court's concurrence, the convictions of Petitioner must be reversed.

## ARGUMENT

## SECTION ONE:
## THE CRESTLINE WARRANT

### I

### DID THE TRIAL COURT PROPERLY DECIDE ISSUES OF FACTUAL INACCURACIES?

In his Affidavit,[1] the Affiant alleged that he had received, by telephone, information from a Deputy Sheriff who reported that the owner of the residence provided him with information regarding a possible illegal drug lab at the owner's rental property (the property to be searched). The Affiant alleged that he later spoke with the owner and received information from him regarding a possible illegal drug lab operating in the subject residence.[2]

Petitioner argued that the Affiant did not receive such information from the owner of the residence, but, on the contrary, that the owner reported that he believed that the renters at the subject property may have been manufacturing some sort of plastic material.[3]

Respondent argued that Petitioner's claim was inaccurate because the Affiant, in his Incident Report stated that the owner informed the Affiant that he "was told to contact the Sheriff's Office by his relatives who suspected a drug laboratory may be in operation. So the informant may very well have said that when he called in".[4] Respondent reasoned that the Affiant was qualified to interpret information provided him by the owner, because the Affiant had confirmed his suspicions when he made certain observations at the premises prior to the search. Respondent reasoned that "this interpretation" was harmless and not significant to the question of probable cause.[5]

1 C.T., II, 377-382, inclusive (*see* Appendices).

2 *Id.* at 377 and 378.

3 *See* FN. 1, *supra* at 380; and FN. 69, *infra* at 79.

4 Repondent submitted, "even if the phrase (involving a possible clandestine laboratory operation) was the Affiant's interpretation, so what?" C.T., II, 414, 1-15 (*see* Appendices).

5 *Ibid.*

The evidence introduced at the time of the hearing consisted of: the Affidavit in Support of the Search Warrant; the Affiant's Incident Report[6]; expert testimony[7]; and the transcript of the Preliminary Examination.[8]

The trial court made no specific findings with respect to this allegation of the Affiant and the Petitioner's argument of facts. However, as will be more fully described, *infra*, this Petitioner relied upon the court's "implied findings" . . . that . . . "would go along with the ruling of the court."[9]

The Affiant also alleged that upon exiting his vehicle on the highway above the subject residence he "immediately noted a strong odor of ether coming from" the subject residence.[10]

Petitioner argued that the Affiant's allegation was an intentional misstatement included within the subject Affidavit for the purpose of deceiving the magistrate.[11]

The Respondent argued that "open ether, or at least its smell, was found in a pan on the porch . . . ," and that the ". . . smell may also have been coming (evaporating) from the two buckets found within the house . . ."[12] In addition, the prosecution argued that this was a summer day, and the warmer the day, "the farther the smell will spread because the ether is vaporizing faster."[13]

The evidence introduced throughout the course of the proceedings[14] established the following facts:

That Dr. James Sims, Professor of Chemistry at the University of California, Riverside, for the past eighteen (18) years, was acknowledged as an expert by the court with regard to chemical structures and compounds, and general chemistry.[15]

Dr. Sims testified that he was aware that law enforcement experts trained narcotics officers to look for an odor of ether for the purpose of detecting illicit synthesis of narcotics, but that there were many lawful uses of ether which greatly out numbered the unlawful uses, and that the detection of an odor of ether is ambiguous, at best.[16] Furthermore, the

6 FN. 1, at 377. (*see* Appendices)
7 Portions of this testimony are cited hereinafter.
8 R.T., (Prelim. April 14, 1981), 77, 20-23. (*see* Appendices)
9 R.T., 2, 282, 3-8; 285, 11-15. (*see* Appendices)
10 FN. 1, *supra*, at 379. (*see* Appendices)
11 C.T., II, 245, 16-28; 246; 247, 1-9. (*see* Appendices)
12 C.T., II, 414, 21-24. (*see* Appendices)
13 C.T., II, 415, 1-2. (*see* Appendices)
14 Said cases were consolidated on appeal. Appendix B.
15 R.T., Feb., 46, 24-26; 47, 4-5. (*see* Appendices)
16 R.T., Feb., 48; 49, 1-10. (*see* Appendices)

expert testified that were he to have detected the odor of ether as the Affiant alleged, it would not indicate to him that some specific compound was being synthesized. Further, that he would find it unusual to be in a laboratory where ether was not being used.[17] The expert offered numerous examples of the legal uses of ether.[18] Also, that absent experience, via lengthy periods of exposure to various chemicals, it would be difficult for an individual to distinguish the difference between various chemical smells.[19] Further, that the synthesis of methamphetamine would not, by way of smell, emit any odor unique to its synthesis.[20]

Dr. Sims testified that the vapor of ether travels downhill, because it is heavier than air, and falls to the bottom of a room.[21] Also, that if someone smelled an odor of ether *outside* a building, he would not be concerned with the hazard of fire, because ether is not dangerous in that situation.[22]

Dr. Sims proposed that it would be unlikely for someone to be able to smell a strong odor of ether upon the highway at the location where the Affiant claimed to have first detected the odor. On the contrary, it would be a person below the highway, and underneath the ether, who would smell the same, were there any at the location.[23]

The expert submitted that if the wind blew, one might be able to smell ether up on the highway,[24] but when ether changes from a liquid to a vapor, it is difficult to detect its odor more than fifty (50) feet from its source;[25] and while ether is dispersing into the atmosphere, a residual smell remains only while there is still liquid ether in the area.[26]

Upon being informed by the owner of the "sweet smell" he had detected two days prior,[27] the Affiant inquired of the owner whether the smell was ether. The owner was unable to identify the smell.[28]

No evidence that ether was seized at the premises was introduced; the Return to the Search Warrant listed none; and the Affiant testified that there was no ether discovered at the subject residence when the Search

[17] R.T., Feb., 31, 9-18. (*see* Appendices)
[18] R.T., Feb., 33, 17-26; 34; 35; 61, 1-19. (*see* Appendices)
[19] R.T., Feb., 36, 1-22. (*see* Appendices)
[20] R.T., Feb., 65, 16-26. (*see* Appendices)
[21] R.T., Feb., 37, 2-14. (*see* Appendices)
[22] R.T., Feb., 37, 17-26; 38, 1-4. (*see* Appendices)
[23] R.T., Feb., 38, 10-21. (*see* Appendices)
[24] R.T., Feb., 38, 22-26. (*see* Appendices)
[25] R.T., Feb., 39, 1-17. (*see* Appendices)
[26] R.T., Feb., 39, 11-23; 40, 18-26; 41; 42, 1-14; 43, 1-16. (*see* Appendices)
[27] The record is devoid of any evidence indicating that the residence was in a different state of repair on August 1, 1981, than it was on August 3, 1981.
[28] *See* FN. 1, *supra*, at 378.

Warrant was served.[29] There appears no "break in the chain of evidence" between the Affiant's initial detection of the smell of ether and the service of the Search Warrant.[30]

The expert testified that it is easy to confuse chemical smells,[31] when the court suggested to the expert that it had detected an odor of ether emanating from this witness.[32]

Respondent offered no expert testimony and submitted that Respondent was limited to the testimony of the Affiant during the Preliminary Examination and his incident reports.[33]

Respondent did, however, offer testimony of a seasonal firefighter who was employed by the California Department of Forestry on the day of the search. The witness testified that on the day in question she was stationed in the Crestline area and "We responded to a possible fire and explosion"[34] at the subject residence.

The witness testified that after parking the fire truck on the highway and on the opposite side of the road above the residence, she noticed a chemical smell which was familiar to her, but she was not certain what she was smelling.[35] The witness testified that a few minutes later she made a determination that what she had smelled was an odor of ether. She stated that she recognized the odor after her supervisor returned from the residence and stated "they had found some sort of lab, and probable ether."[36]

Upon cross-examination, the witness testified that she had been contacted by a Detective with the San Bernardino County Sheriff's Office approximately two (2) months prior to her appearance in court[37] and had been asked to provide "corroborating evidence. . ." by way of her testimony.[38]

The witness testified that when first contacted by the Detective, she thought the incident occurred between July and December, 1981. She

[29] R.T., Feb., 57, 16-26; C.T., I, 117, 20-25. (*see* Appendices)

[30] *See* FN. 1. at 379. (*see* Appendices)

[31] R.T., Feb., 58, 11-16. (*see* Appendices)

[32] When Judge Hyde first thought he had detected an odor of ether, he inquired whether it could have been emanating from Dr. Sims. Then he suggested that the Court Reporter had not put ink in her machine, but later indicated that the Reporter had in fact "inked up her machine." Counsel for Petitioner urged that people often have sensory impressions according to their desires. R.T., Feb., 54, 19-26; 55, 1-11; 58, 16-26; 71, 6-9; R.T., 1, 203, 4-16; R.T., 2, 258, 1-4.

[33] R.T., Feb., 72, 14-22. (*see* Appendices)

[34] R.T., 1, 18, 7-24. (*see* Appendices)

[35] R.T., 1, 19, 3-25. (*see* Appendices)

[36] R.T., 1, 19, 25-26; 20, 1; 21, 4-9. (*see* Appendices)

[37] R.T., 1, 31, 13-25. (*see* Appendices)

[38] R.T., 1, 34, 20. (*see* Appendices)

then contacted her former supervisor at the California Division of Forestry about the date of the incident.[39]

The witness testified that she had based her opinion about the smell upon her supervisor stating that there had been "some sort of lab, and probable ether"[40] and upon her training.[41]

Subsequently, the witness testified that she was not certain what she had smelled that day[42] but that her experience with ether was "very limited"[43] and also, that her supervisor hadn't actually used the word ether in reporting what had been discovered.[44] Also, that she had concluded she smelled ether because she thought the residence might contain a lab which was making PCP,[45] because ether was used "just for drugs and things like that". Further, that she had been instructed that if she smelled ether, drugs were probably somewhere nearby.[46]

The witness conceded that she did not know whether ether was common solvent used in organic chemistry, nor whether there were any lawful uses of ether.[47] The witness stressed that she was not an expert in this area,[48] and repeated that she really wasn't sure of what she had smelled on the day in question.[49] Finally, the witness testified that if she had not seen the front door open, she would not have surmised that the odor she detected was emanating from the subject residence.[50]

Subsequently, Respondent offered testimony from Deputy Charles Wyatt, a San Bernardino County Sheriff's Deputy, who was assigned to the identification division on August 3, 1981, and was summoned to the Crestline residence tht day.[51]

Deputy Wyatt testified that when standing across the street from the subject residence it is not possible to see the front door of the house.[52]

[39] The witness testified: "I was vague on it and maybe it was important that I be — you know, look at the log, and know the time and date again." R.T., 1, 22, 15-26; 25: 26; 27, 1-9.

[40] R.T., 1, 21, 4-9.

[41] The witness' training consisted of a college class covering fundamentals of fire behavior and control wherein she was exposed to certain chemicals and explosives, including ether. R.T., 1, 20, 24-26; 21, 1.

[42] R.T., 1, 49, 13-14. (*see* Appendices)

[43] R.T., 1, 73, 24-26; 74, 1-13. (*see* Appendices)

[44] The witness confided that her supervisor had a sinus cold and could not smell anything that day. R.T., 1, 29, 12-15.

[45] R.T., 1, 29, 16-19. (*see* Appendices)

[46] R.T., 1, 30, 1-8. (*see* Appendices)

[47] R.T., 1, 26, 29; 30, 1-19. (*see* Appendices)

[48] R.T., 1, 28, 11; 75, 7-8. (*see* Appendices)

[49] R.T., 1, 74, 1-13 & 18-26; 75, 1-8. (*see* Appendices)

[50] R.T., 1, 53, 19-25. (*see* Appendices)

[51] R.T., 1, 94, 25-26; 95, 1. (*see* Appendices)

[52] R.T., 1, 145, 2-15; 147, 4-26; 148, 1-3. (*see* Appendices)

The witness offered his opinion that the residence was designed for privacy, and it would be difficult to see into the residence from outside, or at ground level.[53]

The witness testified that the decking, upon which the Affiant traveled to reach the rear of the residence, had a railing which was covered with some sort of trim preventing persons at ground level from seeing up on the deck.[54]

Over objection of Petitioner, Respondent then offered into evidence photographs of the interior of the residence taken by the witness during the course of the search.[55]

Respondent made an offer of proof as to the relevancy of the photographs, suggesting that the photographs depicted what the officers saw, and that it was important in making a probable cause determination to see what the officer saw.[56]

The trial court overruled the objection of Petitioner and permitted Respondent to introduce said photographs as evidence.[57] By way of the photographs, Respondent attempted to show that a dish depicted in a photograph may have contained ether, which was smelled by the Affiant, but not analyzed by laboratory personnel.[58]

Respondent moved to introduce all photographs on the grounds "simply that they bore on the motion."[59]

Upon Preliminary Examination, the Affiant testified that he may have smelled ether or something else that he thought was ether.[60]

The court found that the "statement regarding the danger of fire or explosion was in actuality there at the time".[61] In response to Petitioner's request, the court held that it was not required to, and would not make, findings of fact, but the "implied findings" should support the

[53] R.T., 1, 150, 6-12; 151, 11-18; 155, 10-15. (*see* Appendices)

[54] R.T., 1, 155, 2-19. (*see* Appendices)

[55] R.T., 1, 5-16; 17, 1-10. (*see* Appendices)

[56] Respondent stated that if having seen the subject photographs, the court would somehow be influenced in its decision, Respondent would not offer the photographs. R.T., 1, 14, 1-6.

[57] R.T., 1, 96, 1-12; 102, 5-26. (*see* Appendices)

[58] Respondent subsequently offered photographs to establish that certain buckets, not seized by the officers during the search of Petitioner's residence on August 4, 1981, contained methamphetamine. R.T., 1, 20, 3-19; R.T., 2, 518, 18-26.

[59] Prior to admitting the photographs, the trial court acknowledged that it understood the concern of Petitioner "with the court looking at the pictures to determine angles of admissibility, because then the court sees what is in the pictures and thereby he becomes tainted". R.T., 1, 166, 14-21; R.T., 2, 287, 9-12.

[60] No analysis of chemicals seized was admitted showing ether as one such chemical. C.T., I, 45, 4-14; 139, 20-26.

[61] R.T., 2, 281, 13-14.

general ruling of the court.[62]

Had the trial court found that the Affiant intentionally misstated these facts, the same should have been excised from the Affidavit.[63]

The Affiant alleged, that after smelling ether upon the highway after exiting his vehicle, he was aware of the extreme volatile nature of ether, and the "danger to persons in or around the residence," and, therefore, walked down the stairs to the front door of the residence and attempted to contact someone within by knocking. The Affiant alleged that after receiving no reply he walked around to the rear of the residence on an enclosed or fenced deck. Once at the rear of the residence he observed numerous articles of laboratory equipment, and smelled a very strong odor of ether. Based upon these findings, he secured the premises with a Sheriff's Patrol Unit and "called for . . . Fire Department Officials to assist in the investigation."[64]

Petitioner argued that the Affiant did not have any doubt as to the source of the odor but was certain as to its point of origin.[65] Also, that the Affiant had no concern for anyone in or around the residence, nor did he understand the volatile nature of ether, i.e., whether there was danger to persons in or around ether.[66] Petitioner submitted that these allegations were intentional misstatements which were employed by the Affiant to justify a confirmatory search.[67]

Petitioner argued that these intentional misstatements, when viewed as a whole, clearly had to have a significant effect upon the magistrate's reasoning regarding danger of fire or explosion.[68]

Finally, Petitioner argued that the Affiant's allegation that he contacted Fire Department Officials "to assist in the investigation" (which appears from the Affidavit to have taken place immediately subsequent to contacting a Sheriff's Patrol Unit to secure the premises) was an intentional misstatement.[69]

Respondent argued that although a motive for the Affiant to have alleged, as per his Affidavit, that he contacted Fire Department Officials was unknown, it was not intended "to stampede the magistrate into issuing a Search Warrant before the house blew up and a conflagration

[62] R.T., 2, 285, 9-26; 286. 1-2. (*see* Appendices)

[63] *Franks v. Delaware*, 438 U.S. 154 (1978). Petitioner acknowledges this decision permits a finding of probable cause if the remaining statements, when re-examined, constitute a sufficient factual basis for the same.

[64] *See* FN. 1, *supra*, at 379-380.

[65] R.T., Feb., 37, 17-26; 38, 1-4; 66, 14-25; 67, 1-11 (*see* Appendices)

[66] C.T., II, 245-254; R.T., 1, 180-224.

[67] *Ibid.*

[68] *Ibid.*

[69] *Ibid.*

ensued."[70] Respondent claimed that "exigent circumstances" was not the reason for issuance of the subject warrant, but was the reason the Affiant went around the house to determine whether anyone was inside;[71] and seeing "evidence of a drug laboratory and no evidence of anyone inside" he then sought a Search Warrant.[72] Respondent suggested that if this allegation was a misstatement, it was "innocent because not offered on the question of probable cause and immaterial to it."[73]

Upon Preliminary Examination, the Affiant testified that he did not believe that there would in fact be an explosion, because it would have already occurred. Furthermore, that rather than entering the residence to make a determination of whether there was some pilot light, etc., which might ignite the alleged ether, and, presumably whether any person within was in need of assistance.[74] he felt that that it was a situation which did not require contact with fire officials, and he did not enter the residence because he intended to acquire a Search Warrant. The Affiant admitted that he did not request fire units nor alert the forest service until subsequent to issuance of the subject Search Warrant, which was approximately five (5) to six (6) hours later.[75] This testimony was corroborated, in part, by Respondent's firefighter witness.[76]

The trial court found that "according to the testimony of experts, what appeared to be at the time both to the citizen and law enforcement, it would seem that the conclusion and that statement regarding the danger of fire or explosion was in actuality there at the time."[77]

Petitioner submits that the Court of Appeal committed reversible error when it determined that Petitioner had not met his "threshhold burdens

[70] C.T., II, 413, 10-13. (*see* Appendices)

[71] C.T., II, 413, 20-23. (*see* Appendices)

[72] *Id.* at 23-24. (*see* Appendices)

[73] *Id.* at 25-27. (*see* Appendices)

[74] C.T., I, 118, 17-26; 119, 1-20. (*see* Appendices)

[75] C.T., I, 120, 2-22; 121, 5-26; 122; 123, 1-3; 124; 125, 4-10. (*see* Appendices)

[76] The firefighter, called as a witness by Respondent, testified that upon arriving at the scene, she observed that law enforcement personnel had made entry without the benefit of assistance from fire personnel. R.T., 1, 37, 23-26; 76, 1-18.

[77] In determining whether these allegations were misstatements, the trial court found that "the constitutional safeguards that we all have" are built upon a "corner stone of reasonableness" and that when considering all of the proceedings involved "in light of reasonableness, and the reasonableness of the situation . . . , you reach essentially an opposite conclusion . . ." to that of Petitioner herein. Further, the court suggested that "we all tend to get a little bit fragmented" when we "do a sort of post mortem on the whole structure of this obtaining of Search Warrant procedures." The court further suggested that the situation must be viewed in light of the totality of the situation as confronts law enforcement at the time." R.T., 2, 279, 17-26; 280, 2-8, 12-13; 281, 5-14.

of proof"[78] requiring that "he must prove the existence of such misstatements, as well as prove the Affiant's knowledge of their falsity" (citation omitted).[79]

Your Petitioner respectfully inquires: "what more must be shown?"[80] What the Affiant stated as fact in his Affidavit, was shown to be fallacy through his subsequent testimony. No extrinsic or collateral evidence was necessary to establish the validity of this conclusion.

## II.

## WERE THE AFFIANT'S OBSERVATIONS FROM THE REAR DECK OF THE RESIDENCE THE FRUITS OF A CONFIRMATORY (WARRANTLESS) SEARCH?

Petitioner argued that the Affiant had initially driven to the Crestline residence for the purpose of confirming his suspicions that there was an illegal drug lab operating therein.[81] Respondent agreed.[82] Petitioner argued that observation of Affiant thereupon should have been excised.[83]

The trial court found that the Affiant did not conduct a confirmatory (warrantless) search, and that there were "exigent circumstances" at the time which justified the Affiant investigating further. The court reasoned that this was simply a furtherance of his investigation and not in violation of any reasonable expectation of privacy.[84]

The Court of Appeal upheld the Trial Court, referring only to Affidavit. The Court of Appeal misstated when fire officials were contacted,[85] and did not discuss the self-impeaching testimony of the Affiant. Further, the Court of Appeal made no reference to the expert testimony of Petitioner's witness, nor to the fact that ether was not found at the residence.

[78] Ct. App. at 8.

[79] Ct. App. at 7.

[80] Petitioner registered the same inquiry with the trial court and the Court of Appeal, as the foregoing clearly displays.

[81] C.T., II, 252; R.T., 1, 190, 23-26; 198, 11-15; 203, 2-3; 206, 15-22; 219, 4-13; 221, 24-26. (*see* Appendices)

[82] Respondent submitted, however, that the smell of ether "was in plain view and involved no search at all," and "because the occupant broadcasted the use of ether, there is no right of privacy involved...". R.T., June, 137, 7-17; C.T., II, 417, 14-15, 23-27; 418, 2-3; 419, 19-21; C.T., I, 126, 6-27; 127, 16-18; R.T., 2, 219, 4-13.

[83] R.T., 2, 222, 13-21. (*see* Appendices)

[84] The court specifically found that the officer always has a duty to investigate, and that even though the premises were clearly designed for privacy, "the expectation of privacy does not automatically lock the door to reasonable intrusions for the purpose of proper investigation of criminal activity." R.T., 2, 282, 9-18; 283, 1-3, 6-12; R.T., 1, 156, 5-10.

[85] Ct. App. at 8.

## III

## WERE THE AFFIANT'S OBSERVATIONS FROM THE REAR DECK MADE IN IN VIOLATION OF PETITIONER'S REASONABLE EXPECTATION OF PRIVACY?

Petitioner argued that absent exigent circumstances, the Affiant had no lawful right to be on the subject premises prior to possession of a duly executed Search Warrant. That absent the same, his presence at the subject premises was in violation of Petitioner's reasonable expectation of privacy.[86] Petitioner submitted that these observations should have been excised.[87]

Respondent argued that the Affiant went to the subject residence to confirm his suspicions about an illegal drug lab, and upon his arrival smelled ether and knew that it must have been strong inside the residence. Based upon the same, and the Affiant's concern for individuals conscious or otherwise, within the subject residence, the Affiant was more involved in safety precautions than investigation of criminal conduct. Respondent reasoned the Affiant was, therefore, entitled to take all reasonable steps to contact someone within the subject residence.[88]

Respondent submitted that no right of privacy exists "in connection with what has been publicly exposed,"[89] and the good faith belief of the Affiant in the propriety of what he was doing would legitimate his observations.[90]

Respondent argued that *even if* the Affiant's observations at the subject residence had been excised from the Affidavit, there remained sufficient probable cause for issuance of the subject warrant.[91] Such test was never performed.

The evidence established the Affiant went to the residence for the purpose of confirming his suspicions about an illegal drug lab in operation therein; that it would be extremely unlikely for the smell of ether to be detected upon the highway above the subject residence (as alleged by the Affiant); that the smell of ether is not an indication of exigent circumstances; and that the Affiant was not concerned about fire or explosion; and the residence was very private in its design and location.[92]

[86] The Affiant knew that Petitioner was the lessee. *See* FN. 1, *supra*, at 379.

[87] Petitioner relied primarily upon California law, but discussed *Johnson v. United States*, 333 U.S. 10, 13 (1948) and the odor of "forbidden substances."

[88] C.T., II, 418, 2-12; 419, 1. (*see* Appendices)

[89] *Id.* at 419, 2-23. (*see* Appendices)

[90] *Id.* at 419, 25-27; 420, 1-3. (*see* Appendices)

[91] *Id.* at 420, 4-16.

[92] R.T., 2, 283, 6-9; R.T., 1, 155, 10-22; 156, 5-10. (*see* Appendices)

Petitioner argued that Police Officers may not obtain facts to support probable cause for the issuance of a Search Warrant from constitutionally protected areas wherein a reasonable expectation of privacy exists.[93]

The Court of Appeal affirmed the Trial Court when finding that "exigent circumstances" existed upon the Affiant detecting an odor of ether, and, therefore, "enabled (the Affiant) to walk onto the rear deck without violating Fourth Amendment proscriptions.[94]

Petitioner contends that the findings of the Court of Appeal constitute reversible error. The weight of the evidence overwhelmingly established that the Affiant entered into this constitutionally protected area (wherein a reasonable expectation of privacy existed)[95] solely for the purpose of making observations which he could use as evidence of probable cause for the issuance of a Search Warrant. Further, that said observations could not have been made from any location where the Affiant was lawfully entitled to be located.

## IV

## DID THE AFFIDAVIT SATISFY PROBABLE CAUSE REQUIREMENTS?

Petitioner argued that the Affidavit in support of the Search Warrant did not contain facts sufficient to constitute probable cause.[96]

Petitioner analyzed the facts contained within the Affidavit in Support of the Search Warrant, placing them into two (2) categories, to wit: The informant's observations, and the Affiant's observations.[97]

Specifically, Petitioner argued that nothing in the information provided by the citizen informant (the owner) would be indicative of criminal conduct. In fact, the owner related that upon making his observations at the subject residence on August 1, 1981, he came to the conclusion that the renters were possibly manufacturing some plastics. The owner waited for two (2) days before he contacted law enforcement personnel.[98] Apparently, the owner made contact with the Sheriff's Office only at the suggestion of his son and daughter-in-law, who

[93] C.T., II, 260-266; R.T., 2, 248-260; 261, 1-21. (*see* Appendices)

[94] Ct. App. at 9 (Appendix A)

[95] Petitioner submits that implicit within the finding of the Court of Appeal is a determination that absent exigent circumstances, the Affiant would have been in violation of "Fourth Amendment Proscriptions."

[96] C.T., II, 266, 22-28; 267; 268, 1-21; R.T., 2, 261, 9-26; 262, 1-14; 263, 2-14; 265, 10-26; 266; 267, 1-2; 270, 9-23. (*see* Appendices)

[97] *See, e.g.*, C.T., II, 269-271. (*see* Appendices)

[98] *See*, FN. 1, *supra*, at 378.

informed him that *they thought* his findings might be indicative of an illegal drug lab.[99]

The Affiant alleged that upon arriving at the premises he smelled ether; that the smell of ether became stronger as he approached the residence going to the rear of the premises; that he observed packing crates, stirring rods and rubber glaves, and saw chemicals and various items of laboratory equipment from his position on the decking at the rear of the subject residence.[100]

The Affiant also alleged that he had certain concerns regarding the volatile nature of ether, and, therefore, secured the area by contacting Sheriff's Office personnel and Fire Officials to assist in the investigation.[101]

In addition, the Affiant alleged his expertise with regard to his training in vice and narcotics, and clandestine laboratory operations. [102]

Under a section entitled "Affiant's Expertise," the Affiant alleged that it had been his experience that persons involved in the manufacture and/or possession of narcotics often hid the substances in their homes, on their persons, or in vehicles away from the actual laboratory operation.[103] Petitioner submitted that this language was irrelevant for the purpose of determining probable cause.[104]

The Affiant further alleged that he had reviewed with three (3) other narcotics officers his reasons for believing that there was a clandestine laboratory operation located at the subject residence — without any specificity regarding these discussions.[105]

From the above, it appears that the owner provided the Affiant with no facts which would be indicative of criminal conduct. The Affiant then drove to the residence to determine whether some criminal conduct was taking place.[106]

The observations of the Affiant regarding chemicals and laboratory equipment certainly do not warrant a man of reasonable caution in believeing that a crime had been or was being committed. Petitioner proposes the magistrate could not have made a finding of probable cause with these observations alone. Therefore, it appears as though

[99] *Id.* at 378-379.
[100] *Ibid.*
[101] *Id.* at 379-380.
[102] *Ibid.*
[103] *Ibid.*
[104] *Ibid.*
[105] *Ibid.*
[106] *Ibid.*

both the Affiant and the magistrate assumed that the finding of a laboratory operation in rental property was clearly an indication of some illegal activity. However, the expert testimony established that the detection of an odor of ether would likely be an indication of some *legal* activity. Also, that a laboratory operation fitting the description given by the Affiant, and the owner, would not necessarily be an indication of illegal activity, but appears to be common in the scientific community for the purpose of conducting legitimate and lawful experimentation.[107]

In this light, it seems the Affiant should have specified what he had seen with some detail, and how the various items described were most likely present for an illegal purpose, and not some other legitimate purpose. Petitioner submits that an assumption of illegal activity is not evidence; such an assumption does not make it more likely than not that criminal conduct was occurring at the residence.

In support of argument, Petitioner offered this Honorable Court's definition of probable cause from *Beck v. Ohio*.[108]

Upon Preliminary Examination , the Affiant testified that he believed that he had found a laboratory that was in the process of manufacturing something, but he had no idea what stage of processing, and that from his point of observation, he could not determine the process that was involved.[109]

Respondent argued that when the Affiant was on the rear deck of the residence he, "through the glass of the door saw evidence of a drug laboratory . . .".[110]

Respondent submitted that the Affiant's allegation that he had reviewed his reasons with other officers for believing that there was an illegal drug lab within the subject residence was sufficient,[111] because the Affiant had stated his training and experience which qualified him to give such an opinion, "especially within the context of probable cause, which is all that is required".[112]

Respondent further submitted that even though the Affiant could not specify what was being manufactured (sic) and was unable to determine the stage of processing, and though unable to see the entire process involved, did not "mean that he doubted that it was a laboratory".[113]

[107] *See*, FN. 16, *supra*, and FN. 119, *infra*.

[108] 379 U.S. 89 (1964). In *Beck*, this Honorable Court asked whether the magistrate, upon reading the Affidavit, could reasonably infer the probability that specific things needed as evidence were located at the particular place to be searched. 379 U.S. at 94.

[109] C.T., I, 118, 24-26; 119, 1-15. (*see* Appendices)

[110] C.T., II, 413, 23-25. (*see* Appendices)

[111] C.T., II, 415, 18-23. (*see* Appendices)

[112] *Id.* at 415, 26; 416, 1. (*see* Appendices)

[113] C.T., II, 416, 2-7. (*see* Appendices)

Respondent reasoned that it was through the sliding glass door that the Affiant "saw what was obviously a drug laboratory".[114]

Respondent stressed that the smell of ether was indicative not only of danger of fire or explosion, but was clearly an indication of a drug laboratory.[115]

As to the requirement of specificity as to the items sought to be seized at the premises sought to be searched, Respondent reasoned that "from the fact that affiant listed and asked to search for the chemicals used in the making of both methamphetamine and PCP," it may be that from the porch he could not see the chemicals and/or labels he was observing well enough to determine whether they were appropriate to one drug or the other. Yet he could know from his experience that it was one or the other".[116] This argument, of course, was not supported (but was contradicted) by the Affiant's testimony.

Respondent suggested that a place apparently housing a laboratory was a conclusion that even an "untrained person could reach from what he saw, or what was described in this affidavit even though he could neither describe nor fully understand the description of the various chemicals and apparatus seen."[117] Petitioner countered with a query whether a laboratory is evidence of illegal activity.[118]

The evidence introduced established that the Affiant was not sure what he had seen with respect to the alleged laboratory operation at the subject residence. In addition, Petitioner's expert testified that reading the Affidavit did not indicate to him that any specific synthesis had been, or was, in progress.[119] Further, the expert testified that ether need not be used in the illicit synthesis of narcotics, because ether is a solvent, not an ingredient, and it is not necessary to use ether in the synthesis of methamphetamine of PCP.[120] The expert submitted that there are a number of solvents commonly used in the laboratory setting, only one of which is ether.[121]

The expert submitted that there was nothing in the Return to the Search Warrant that would indicate that someone was synthesizing

[114] *Id.* at 20-22. (*see* Appendices)

[115] C.T., II, 419, 11-15; 420, 4-9. (*see* Appendices)

[116] C.T., II, 421, 8-13. (*see* Appendices)

[117] *Id.* at 24-26; 422, 1. (*see* Appendices)

[118] Respondent concluded argument with the reasoning that "even without the benefit of a trained opinion, it would be reasonable to conclude that a vacation rental suddenly turned into a laboratory is probably manufacturing some illegal drug." C.T., II, 422, 3-6.

[119] R.T., Feb., 28, 11-26; 29, 1-18; 57, 21-26. (*see* Appendices)

[120] R.T., Feb., 18, 19, 20. (*see* Appendices)

[121] R.T., Feb., 24, 18-19. (*see* Appendices)

something illegal, as the equipment described could be used for many kinds of experiments or synthesizing.[122]

The expert testified he had studied a Chemical Abstract,[123] and found that there were at least one hundred (100) to one hundred fifty (150) uses of ether referenced in the literature. All references were to lawful uses of ether, primarily in its solvent capacity.[124]

The Court of Appeal affirmed the Trial Court when finding substantial evidence existed which made "it substantially probable that there is specific property lawfully subject to seizure presently located in the particular place for which the warrant is sought"[126] (citation omitted). The Court of Appeal found that both the Affiant and the owner "had observed tools, gloves, stirring rods, and boxes of white powder *in* the Crestline residence" (emphasis added). The law enforcement officer had smelled ether on or about the premises" which "made it 'substantially probable' that items used in the manufacture of controlled substances were present at the residence . . ."[127]

## SECTION TWO:
## THE 28TH STREET WARRANT
## (August 4, 1981)

## V

## DID THE AFFIDAVIT CONTAIN SUFFICIENT FACTUAL ALLEGATIONS TO SUPPORT A FINDING OF PROBABLE CAUSE?

At trial court, Petitioner prefaced argument by recitation of the facts alleged by the Affiant in his Affidavit and submitted the same were insufficient to support a finding of probable cause.[128]

Petitioner suggested that the allegations regarding the Affiant's experience with persons making illegal narcotics was "canned language," found within each of the affidavits challenged herein, and was not supported by current relevant facts regarding Petitioner. Petitioner argued that the facts so recited by the Affiant in his Affidavit did not establish, with any certainty, that Petitioner resided at the address of the property to be searched. Petitioner reasoned that a drivers license shown upon signing a rental agreement, and subsequent inquiry to the Department of Motor Vehicles which confirmed Petitioner's drivers

[122] R.T., Feb., 26, 20-26; 27, 1-2, 15-24; 28, 11-26; 29; 30, 1-6, 21-26; 31, 1-18. (*see* Appendices)

[123] A source of original literature in the field of chemistry.

[124] R.T., Feb., 31, 19-26; 32-35. (*see* Appendices)

[125] R.T., 2, 282, 14-21. (*see* Appendices)

[126] Ct. App. at 1 (Appendix A)

[127] Ct. App. at 1 and 6 (Appendix A)

[128] C.T., II, 274, 15-28; 275; 276; 1-16; and O.B., 43, 10-28. (*see* Appendices)

license address, without more, was insufficient. Petitioner reasoned that absent some surveillance, informant information, or other information, the Affidavit did not establish that any particular individual connected with the findings of the August 3rd, 1981 (Crestline) search resided at the premises to be searched. Petitioner submitted that the Affiant failed to establish that Petitioner was likely to be residing at the subject property on the day in question, or any period or day contemporaneous with the search. Petitioner further submitted that the Affidavit did not allege facts which would justify a magistrate's inference that a crime had been or was being committed at the subject property, nor that evidence needed would be located at the premises to be searched.[129]

Petitioner also argued that some of the facts alleged in the Affidavit were stale, and should have been excised.[130]

Respondent argued that an experienced narcotics officer's opinion on the *modus operandi* respecting the location of drugs and/or records at various places was competent evidence for a magistrate to consider.[131]

Respondent submitted that "numerous cases have upheld Search Warrants on the theory that one who sells narcotics may have more at his residence or place of operations".[132] Respondent resolved that this theory was applicable in the instant matter, because when there is an allegation of the manufacture of narcotics "the purpose is obviously to sell the finished product".[133]

Regarding staleness, Respondent argued that the Affiant's allegations about two people[134] who rented another residence (Desert Hot Springs), some six weeks prior, which allegedly contained an illegal drug lab, was not stale information. Respondent reasoned the same was evidence of continuing illegal activity by those (two) people.[135]

There was no evidence introduced at any time tending to establish that there was any surveillance of the residence to be searchd prior to the issuance of the warrant, other than a cursory examination of the exterior of the residence for the purpose of describing the same with particularity.

[129] R.T., 2, 292-301; 302, 1-20; O.B., 39-43; 44, 1-7 (*see* Appendices)

[130] C.T., II, 278, 3-26; O.B., 40, 24-27 (*see* Appendices)

[131] Respondent also argued. ". . . it is canned language because it is a predictable fact from the officer's experience". R.T., 2, 320, 7-19; 424, 27; 425, 1-3. (*see* Appendices)

[132] C.T., II, 425, 4-6 (*see* Appendices)

[133] C.T., II, 425, 6-8 (*see* Appendices)

[134] Not parties herein.

[135] Respondent suggested that the inference to be drawn from that information was if Petitioner's "associates are dopers, he is probably one himself. That is a reasonable inference, but hardly a probable basis for issuance of the search warrant". R.T., 2, 426, 6-15.

The trial court, in denying Petitioner's Motion to Suppress respecting the August 4, 1981 Search Warrant, made no specific findings.

The Court of Appeal affirmed the trial court. The court reasoned that (a) the Affiant's allegations regarding the August 3, 1981 search, (b) the information about a Desert Hot Springs lab, and (c) Department of Motor Vehicle information confirming Petitioner's drivers license address made "it 'substantially probable' that Petitioner resided at" the subject residence, and "that this residence contained items used in the manufacture of methamphetamine". (citation omitted)[136]

## VI

## DID THE AFFIDAVIT CONTAIN ALLEGATIONS OF FACT WHICH WERE "FRUIT OF THE POISONOUS TREE"?[137]

Relying upon a favorable ruling respecting the August 3, 1981 Search Warrant, Petitioner argued that the "fruit of the poisonous tree" doctrine[138] applied as to all allegations of fact within the Affidavit derived from the August 3, 1981 search, and the same, therefore, should have been excised.[139]

Respondent offered no response, either by way of written memoranda or oral argument.

The court referred to its decision to uphold the August 3, 1981, (Crestline) Search Warrant, and ruled that the same, therefore, validated the August 4, 1981, search of the 28th Street residence.[140] The Court of Appeal did not address the issue.[141]

## SECTION THREE:
## THE 28TH STREET WARRANT
## (December 14, 1981)

## VII

## DID THE AFFIDAVIT CONTAIN SUFFICIENT FACTUAL ALLEGATIONS TO SUPPORT A FINDING OF PROBABLE CAUSE?

[136] Ct. App. at 13.

[137] *Wong Sun v. United States*, 371 U.S. 471 (1963).

[138] *Ibid.*

[139] C.T., II, 285, 7-17; 288, 3-22; 289, 3-28; 290, 1-5; R.T., 2, 308, 16-23; 309, 1-11 (*see* Appendices)

[140] R.T., 2, 471, 2-6 (*see* Appendices)

[141] It is reasonable to assume that the Court of Appeal found this argument moot, having decided to affirm the trial court regarding the validity of the August 3, 1981 Search Warrant.

At trial court, Petitioner offered an outline of the facts alleged by the Affiant in his Affidavit in Support of the Search Warrant,[142] and categorized those facts into three categories, (a) stale information, (b) informant information, and (c) the conclusionary language of the Affiant.[143]

## A. DID THE AFFIDAVIT CONTAIN ALLEGATIONS OF FACT WHICH WERE "STALE"?

Petitioner argued that the allegation of the Affiant regarding the August 3, 1981, search at the Crestline residence and August 4, 1981, search of Petitioner's residence was stale information, being over four months old, and had no bearing on whether any particular activity might be taking place at Petitioner's residence on December 14, 1981.

Petitioner argued that the allegation about information provided by an "unproven informant," with no date specified, except that the information came subsequent to the August 4 search, was stale.

Petitioner also argued that the allegation regarding Petitioner's incriminatory admission was also stale information (as it was approximately ten weeks prior to issuance of the search warrant), [144] and therefore, should have been excised from the Affidavit. Petitioner submitted that both the California and United States constitutions require recent information.[145]

Respondent countered that the allegations of fact contained within the Affidavit in Support of the Search Warrant showed a continuing activity, and that continuing activity negates staleness.[146]

The Affiant testified that he did not include current information in the Affidavit with respect to any activities allegedly taking place at the subject residence; that there was no testimony given before the magistrate for the purpose of providing additional information to the magistrate in order to make a detemination as to the staleness issue;[147] that the information he received from the "unproven informant" was subsequent to the service of the August 4, 1981 Search Warrant,[148] and that the language in the Affidavit was vague and the magistrate could have assumed that the information was received the day after the August 4th search, or August 5, 1981.[149]

[142] C.T., II, 301, 15-28; 302-305; 306, 1-13 (*see* Appendices)
[143] C.T., II, 306, 24-28; 307-320; 321, 1-19 (*see* Appendices)
[144] C.T., II, 308, 24-28; 309, 1-3; R.T., 2, 503, 4-5, 19-21 (*see* Appendices)
[145] C.T., II, 278, 9-27, and relying upon *Sgro v. United States*, 287 U.S. 207, 210 (1932). (*see* Appendices)
[146] C.T., II, 429, 14-27; 430; 431, 1-5. (*see* Appendices)
[147] R.T., 2, 454, 1-14 (*see* Appendices)
[148] R.T., 2, 456, 14-20. (*see* Appendices)
[149] R.T., 2, 457, 1-16. (*see* Appendices)

The trial court denied the motion of Petitioner.[150]

The trial court agreed that the Affidavit probably should have had more detail as to the times and places of the information relayed by informants.[151]

The Court of Appeal affirmed the findings of the trial court, agreeing that the "allegedly stale facts provided the magistrate with background information and indicated the presence of a continuous course of criminal conduct."[152]

## B. DID INFORMANT INFORMATION WITHIN THE AFFIDAVIT SATISFY THE *AGUILAR-SPINELLI* "TWO-PRONGED TEST"?

Petitioner argued that the Affiant's reference to "an unproven informant," with no date specified when this information was acquired clearly failed to satisfy the "two-pronged" test established by *Aguilar v. Texas*, 378 US 101 (1964), and *Spinelli v. United States*, 393 US 410 (1969).[153]

Petitioner argued that the information from the "reliable confidential informant" should have been excised from the Affidavit. Reasoning that, even though said informant provided some specificity, this informant, without more, did not meet the requirements of *Aguilar-Spinelli*

[150] The court stated:

> This in effect was an on-going situation. It was represented in the sense to be that by the Affiant, and that although it is characterized as four and a half months — four and a half months, I guess, is somewhat relative, and four and a half months can be extremely a long time. I guess in the life span of a chicken — ranch fly that live and die and their whole life span or the space probe, which will go five million years and still be carrying on long after we are gone.
>
> So, relative time spans are important when you consider them within the — in what we are going and that taken into context with the on-going investigation and conduct, if you want to call it that, of both of the defendant and the law enforcement people, and with regard to this case that is not an overly extensive period of time with regard to the fact that it is not set forth with any particularity, and any particularity or specificity that MORTON (Petitioner) is a resident of that property are detailed in the bases or facts upon which it is contended that he, at that property, has some connection with him. R.T., 2, 471, 7-26; 472, 1-2.

[151] The court stated: That there were "lots of areas which . . . I suppose even a magistrate issuing a warrant might well require that an Affiant coming before him — I suppose I would or wouldn't depending on the time, day or night, of when it was, how busy I was — to put the Affiant under oath and say: 'How about this? When was this search? What is going on here? Make more inquiry.' But, I feel that with regard to these facts, they would be sufficient to sustain the warrant. It is on those bases the court would deny the motions." R.T., 2, 472, 9-26.

[152] Ct. App. at 19.

[153] C.T., II, 310 (*see* Appendices).

regarding reliability, nor personal knowledge as to the location of any contraband.[154]

Petitioner submitted that the confidential reliable informant did not provide any information with respect to the place of residence of Petitioner, and that the Affiant himself did not include any information within the subject Affidavit to indicate to the magistrate why the Affiant believed Petitioner still resided at the subject residence, nor why the Affiant believed the things needed as evidence would be located at the property.

The Affiant testified that he had never used the informant as a source of information prior to the occasion in question, and that the Affiant was aware of the case law requirements for the purpose of establishing the credibility of an informant.[155]

Respondent argued that the "unproven informant" corroborates the information provided by the "reliable confidential informant" because "he is another source of the same kind of information," and that "the date of his information is unimportant. It is sometime between the two Search Warrants, and that is sufficient."[156]

Respondent suggested that the "reliable confidential informant" was established as such.[157]

Petitioner submitted that within the Affidavit there was no allegation that the informant was making a declaration against his penal interest and that it was not reasonable to assume the same, due to his alleged informant status with the Sheriff's Office.[158]

The trial court refused to excise the informant information.[159]

The Court of Appeal, in affirming the trial court, held that "credibility

[154] C.T., II, 312, 6-28; 313, 1-11 (*see* Appendices)

[155] C.T., II, 313, 12-17; R.T., 2, 453, 8-19 (*see* Appendices)

[156] C.T., II, 431, 8-17 (*see* Appendices)

[157] Mr. Morrissey: ". . . the Affiant's description of the informant as reliable is insufficient proof of that fact, but that if, in addition, his observations were sufficiently detailed to make it clear that he is describing personally known events rather than repeating rumors, and his information is against his penal interest, he is sufficiently reliable to support the Search Warrant." ". . . what he (the reliable confidential informant) had to say makes clear that the informant is describing events at which he was present and which are incriminating to him." C.T., II, 432, 8-11.

[158] R.T., 2, 468, 8-26; 469, 1-6. (*see* Appendices)

[159] The court stated that the "test of reasonableness is the main test," and that "the information supplied in the Affidavit would be sufficient in that regard having dealt with actual facts, times and places, and the closeness of the meeting at Sambo's restaurant. With regard to the dealing of the — amounted to an attempt to deal with methamphetamine at that point with all of that information would be sufficient with regard to the establishment of the reliablity elements; although it would indicate some spareness as far as detailed information." R.T., 2, 470, 9-10, 16-26; 471, 1.

and reliability may be established by corroboration," and "Corroboration may . . . be established when two informants make independent, but consistent, reports" (citations omitted).[160]

## C. WERE ALLEGATIONS REGARDING BEHAVIOR OR PERSONS INVOLVED WITH ILLEGAL DRUG TRADE SUPPORTED BY CURRENT RELEVANT FACTS REGARDING PETITIONER?

Within the Affidavit were allegations regarding the Affiant's experience with individuals involved in illegal narcotics possession and sales who hid the same in their homes, on their persons and in their vehicles.[161]

In addition, the Affiant included language regarding his experience with the use of false names and addresses, and false identifications, by such individuals.[162]

Petitioner argued that these allegations amounted to "canned language" not supported by any current relevant facts regarding your petitioner.[163]

Respondent argued that Petitioner was confusing probable cause with reasonable doubt,[164] and that an expert opinion is appropriately considered when determining probable cause.[165] Respondent reasoned that a prior search of Petitioner's residence (August 4, 1981) along with "subsequent evidence of continuing activity, . . . hardly takes an expert opinion to conclude that another search may be productive also."[166]

No narcotics were in fact seized. However, the officers conducting the search did seize approximately fourteen (14) guns and/or rifles, with a subsequent allegation that one such handgun was stolen.[167]

Petitioner argued that an essential element missing from the Affidavit was any facts tending to show that any of the evidence sought to be seized would be located at the residence on or about December 14, 1981.[168] Other than stated herein, Respondent offered no response to this argument.

The Court of Appeal affirmed the trial court in rejecting Petitioner's contention that the "canned language" of the Affiant should have been

[160] Ct. App. at 20.
[161] C.T., II, 398 (*see* Appendices)
[162] C.T., II, 399 (*see* Appendices)
[163] C.T., II, 316; R.T., 2, 465, 2-14. (*see* Appendices)
[164] C.T., II, 433, 13-20. (*see* Appendices)
[165] C.T., II, 433, 20-22. (*see* Appendices)
[166] C.T., II, 434, 3-5. (*see* Appendices)
[167] Count III, Information. (*See* Appendix B , re: Procedural Background)
[168] C.T., II, 318, 3-26 and 319, 4-15. (*see* Appendices)

excised. The Court found the "statements were based on Perry's personal knowledge and experience acquired during the assignment with the . . . narcotics division".[169]

## VIII

## DID THE OFFICERS CONDUCTING THE SEARCH EXCEED THE PERMISSIBLE SCOPE OF THE SEARCH WHEN SEIZING PROPERTY THAT WAS NOT SPECIFIED IN THE SEARCH WARRANT?

Petitioner argued that the officers searching his residence on December 14, 1981 seized property not listed in the Search Warrant, and, therefore, exceeded the permissible scope of the search.[170]

During the course of this search, the Affiant seized a handgun which he "determined was stolen before . . . he . . . left the premises on December 14",[171] by way of verbal report from a City police officer that teletype information reflected the gun to be stolen.[172]

Petitioner argued that the officers were not aware of some specific and articulable facts from which a rational link between the handgun seized and criminal behavior could be inferred at the time he seized the subject handgun, and that checking serial numbers to determine whether the same was stolen constituted a search outside the permissible scope of the Search Warrant, which must be narrowly drawn — requiring a "particular description" of the things to be seized. The seizure of said gun was, therefore, the "fruit" of an unlawful search, and should have been suppressed.[173]

Petitioner recalled testimony of the Affiant, that at the time the Affiant prepared his Affidavit he had every intention of searching for stolen property as well as items specified within the Warrant.[174]

Respondent reasoned that the location of the gun, "secreted behind the stereo along with several other handguns," was reason for suspicion[175] and the "warrant authorized an intensive search".[176] The officers, therefore, were entitled to look anywhere, and were entitled to

[169] Ct. App. at 21.

[170] C.T., II, 283-284; R.T., 2, 302, 21-26; 303-307; 308, 1-11. (*see* Appendices)

[171] R.T., 2, 475, 16-19. (*see* Appendices)

[172] R.T., Prelim., June 1982, 103, 20-26; 104, 1-17.

[173] Petitioner argued that *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971), and *Warden v. Hayden*, 387 U.S. 294 (1967) (in addition to California authorities) were controlling. (C.T., II, 321-323; R.T., 2, 422, 8-26; 423-427).

[174] C.T., I, 126, 18-26; 127, 1-6. (*see* Appendices)

[175] R.T., 2, 475, 24-26; 476, 1. (*see* Appendices)

[176] C.T., II, 434, 26-28. (*see* Appendices)

seize "whatever stolen property they discovered and verified prior to leaving the premises".[177]

Respondent noted that Petitioner was being prosecuted for possession of only one gun which was verified as stolen prior to seizure and removal from the residence.[178]

The evidence before the trial court established that: (a) A search for guns or stolen property "was not the intended search";[179] (b) The Affiant believed that the location of the gun in question was certainly an indication of its stolen nature;[180] (c) The gun did have serial numbers[181] and that they were not altered;[182] (d) Neither the Affiant nor any of the officers conducting the search had read any reports regarding the specific gun in question;[183] (e) When the Affiant seized the gun, "it was just another gun." and he was not aware of any facts that would link that gun to some criminal conduct prior to a stolen property inquiry.[184]

The trial court found that the officers acted properly, and denied this aspect of Petitioner's Motion to Suppress Evidence.[185]

The Court of Appeal affirmed the trial court.[186]

Petitioner submits that the opinion of the Court of Appeal flies in the face of this Honorable Court's decision in *Coolidge v. New Hampshire*,[187] *supra*, requiring that searches "be as limited as possible"[188] and not encourage or permit a "general exploratory . . . rummaging in a person's belongings".[189]

[177] C.T., II, 434, 27-28; 435, 1. (*see* Appendices)
[178] C.T., II, 435, 1-3. (*see* Appendices)
[179] R.T., 2, 477, 15-17. (*see* Appendices)
[180] R.T., 2, 477, 3-9. (*see* Appendices)
[181] R.T., 2, 476, 19. (*see* Appendices)
[182] C.T., I, 103, 20-22. (*see* Appendices)
[183] R.T., 2, 476, 23-26. (*see* Appendices)
[184] R.T., 2, 481, 17-26. (*see* Appendices)
[185] The court stated: ". . . that under the circumstances of this case would be total background and investigation of the conduct that had been in both a considerable period of time and with regard to the prior searches, in which the witness indicated a substantial number of firearms had been picked up and not yet returned; that it was unusual and surprising to him to find this weapon in that particular location. That would give him reasonable cause for suspicion and belief that it was in fact contraband material, and would then being the bases for this confirmation thereafter in picking the item up." R.T., 2, 484, 1-13.
[186] Appendix A, at 44-45.
[187] 403 U.S. 443 (1971).
[188] *Id.* at 467.
[189] *Ibid.*

## IX

## WERE REFERENCES IN THE AFFIDAVIT TO EVIDENCE SEIZED PURSUANT TO THE AUGUST 3, 1981 AND AUGUST 4, 1981, SEARCHES "FRUIT OF THE POISONOUS TREE"?

Petitioner relied upon this Honorable Court's decision in *Wong Sun v. United States*[190], arguing that if the August 3, 1981 (Crestline) Search Warrant was found to be invalid, then the August 4, 1981 (28th Street) Search Warrant must also be invalid. Petitioner reasoned, therefore, that any reference to the same in the Affidavit supporting the December 14, 1981 search, was "fruit of the poisonous tree,"[191] and should have been excised from the Affidavit.

Respondent offered no argument in this regard.

Petitioner contended that if the same had been excised, the Affidavit would not have contained facts sufficient to constitute probable cause; particularly in light of the trial court's finding "that this in effect was an on-going situation".[192]

## X

## WAS THE ALLEGED ADMISSION OF PETITIONER, RECITED WITHIN THE AFFIDAVIT, TAKEN IN VIOLATION OF PETITIONER'S "*MIRANDA RIGHTS*"?

Petitioner argued that an interview[193] between Petitioner and the Affiant, wherein Petitioner allegedly admitted his involvement in a conspiracy to produce and sell drugs, was conducted in violation of Petitioner's Fifth Amendment Privilege Against Self-Incrimination. Petitioner submitted that this Honorable Court's holding in *Miranda v. Arizona*,[194] clearly delineated that no amount of circumstantial evidence indicating that a suspect may have been aware of his "*Miranda* rights" would be sufficient to stand in place of adequate warnings respecting the same, and a waiver thereof.[195]

Petitioner also argued that whether a person was "in custody" at the time of the interview depended upon whether the subject reasonably

[190] 371 U.S. 471 (1963).

[191] *Id.* at

[192] *See*, FN. 150, *supra*.

[193] Said interview took place on September 24, 1981 (six weeks after Petitioner's arrest on August 4, 1981) at the Affiant's office.

[194] 384 U.S. 436 (1966), wherein this Honorable Court delineated specific rights a suspect may invoke pursuant to the Privilege Against Self-Incrimination. U.S. Const., amend. V.

[195] C.T., II, 325, 18-28; 326-327; 328, 1-23. (*see* Appendices)

believed that his freedom of movement was restricted by pressure of authority.[196]

Respondent argued that the *Miranda* decision applied only when a suspect was "in custody"[197] and that Petitioner was clearly not in custody.[198]

Respondent did concede, however, that the "off-hand and quick remarks" of Petitioner[199] would lend itself to "obviously stronger evidence of waiver," but that "a remark like that is certainly indicative of the fact that he knows his rights and is willing to talk".[200]

The evidence introduced at the time of hearing upon this aspect of Petitioner's Motion to Suppress Evidence included testimony from each of the Affiants in the Search Warrants challenged in Section One, Section Two, and within this Section Three, respectively. The first said Affiant to testify was the Affiant in the Affidavit in Support of the August 3, 1981 (Crestline) Search Warrant, who testified that on August 4, 1981, at Petitioner's residence, he advised Petitioner of his "*Miranda* rights".[201]

Next, Respondent offered the testimony of the Affiant in the Affidavit in Support of the August 4, 1981 (28th Street) Search Warrant,[202] who testified that he conducted an interview with Petitioner which was not tape recorded, he did not write an Incident Report regarding said interview, he did not recall the date of the meeting, he did not make notes about that interview, and he did not read to Petitioner the required *Miranda* warnings.[203]

The Affiant in the Affidavit in Support of the December 14, 1981 (28th Street) Search Warrant, testified that shortly before interviewing Petitioner on September 24, 1981, he contacted Petitioner by telephone and asked Petitioner to come to his office to talk about "the charges against him and about the case in general".[204] This Affiant further testified that upon commencing the interview he asked Petitioner "if he recalled being advised of his Rights and if he fully understood those Rights, and he said that he did, there was no problem".[205] The Affiant

[196] C.T., II, 328, 24-28; 329, 1-4. (*see* Appendices)
[197] R.T., 2, 522, 17-26. (*see* Appendices)
[198] R.T., 2, 521, 2-4. (*see* Appendices)
[199] When asked if he was advised of his *Miranda* rights on September 24, 1981 Petitioner purportedly responded with "yeah, no problem with that". C.T., II, 520, 17-19; *see* FN. 200, *infra*.
[200] R.T., 2, 520, 17-23. (*see* Appendices)
[201] R.T., 2, 490, 13-26. (*see* Appendices)
[202] R.T., 2, 498, 1-23. (*see* Appendices)
[203] R.T., 2, 500, 12-26; 501, 1-24.
[204] R.T., 2, 502, 7-26; 503, 4-11. (*see* Appendices)
[205] R.T., 2, 503, 24-26; 504, 1-2. (*see* Appendices)

also testified that Petitioner "understood that he was free to leave at any time".[206]

Upon cross-examination, the Affiant testified that he was familiar with the decision of *Miranda v. Arizona*,[207] and that he "contacted him (Petitioner) on the phone probably a total of about four times".[208] The Affiant further testified that he was "completely unaware" of whether the Petitioner might have been coerced by anyone else from his office, but that it was possible. He acknowledged that he was aware of the fact that he was not the only Detective contacting Petitioner, and that Petitioner had in fact been to the office on prior occasions.[209] The witness also testified that he was aware that criminal charges had been filed charging Petitioner with criminal conduct prior to the interview,[210] and that he knew that Petitioner would not have come to his office but for his status as defendant in pending criminal proceedings.[211]

The court found that the September 24, 1981, interview "was not in fact a custody situation and there was not representation of record, as far as Petitioner was concerned,"[211] and refused to excise the allegation of Petitioner's admission.[213]

The Court of Appeal affirmed the trial court, finding that Petitioner's alleged admission "was not elicited in a custodial setting, and was, therefore, properly included in the supporting affidavit".[214]

## CONCLUSION

In *Weeks v. United States*,[215] this Honorable Court determined that evidence seized in violation of the Fourth Amendment must be inadmissible in court. Through *Weeks*,[216] this Court created the Exclusionary Rule whereby the sanction of exclusion of illegally obtained evidence was determined to be the method of enforcing Fourth

[206] R.T., 2, 504, 8-16. (*see* Appendices)
[207] R.T., 2, 507, 9-11. (*see* Appendices)
[208] R.T., 2, 507-21-26; 508, 1-2. (*see* Appendices)
[209] R.T., 2, 508, 10-18. (*see* Appendices)
[210] R.T., 2, 508, 19-26. (*see* Appendices)
[211] R.T., 2, 509, 1-16. (*see* Appendices)
[212] R.T., 2, 528, 17-21. (*see* Appendices)
[213] R.T., 2, 530, 22-26. (*see* Appendices)
[214] Ct. App. at 21. (*see* Appendices)
[215] 232 U.S. 383 (1914).
[216] *Ibid.*

Amendment[217] rights. This concept was later extended to the States by way of the Fourteenth Amendment[218] in *Mapp v. Ohio*.[219]

The Exclusionary Rule[220] was designed to prevent and deter violaters of the Fourth Amendment.[221] Said Rule is also premised upon the theory that, as the late Justice (then Judge) Cardozo coined, "the criminal must go free because the constable blundered".[222] The operation of the rule then serves to educate the police so that they will not only be more sensitive to the rights of individual citizens, but also more thorough in their fact gathering prior to making application for a search warrant.

In the instant case, none of the affidavits in support of the three respective search warrants contained detailed information derived by way of surveillance, or otherwise — except informant information — which would show that any of the affiants expended the necessary time, required by thoroughness, so that their affidavits might contain sufficient relevant and current factual allegations to support probable cause. Your Petitioner alleges that the three within affidavits are classic examples of the reason for the Exclusionary Rule.

In his dissenting opinion in *Olmstead v. United States*,[223] the Honorable Justice Brandeis described the Exclusionary Rule as being based upon the notion that a government should be as law-abiding as its citizenry. Justice Brandeis suggested that if the agents of the state do not follow laws, then it is unreasonable to expect the population to do so.

From its inception, the Exclusionary Rule has been subjected to much criticism. However, none of the critics have suggested a more viable method of enforcing Fourth Amendment[224] rights for *all* of the citizens of these United States, without first making a determination as to the innocence or guilt of the person complaining.

Your Petitioner suggests that rather than its critics suggesting that Fourth Amendment rights are simply "technicalities" employed by smart defense attorneys to "get their clients off", perhaps those same individuals should take a closer look at not only the history of this country preceding the drafting of this amendment, but also, the hollow-

[217] U.S. Const. amend., IV.
[218] U.S. Const. amend., XIV.
[219] 376 U.S. 643 (1961).
[220] *Weeks v. United States*, 232 U.S. 383 (1914).
[221] U.S. Const. amend., IV.
[222] *People v. Defore*, 242 NY 13, 21 (1926).
[223] 277 U.S. 438 (1928).
[224] U.S. Const. amend., IV.

ness of that euphemism "a man's home is his castle" were the Fourth Amendment[225] not a part of our United States Constitution. For, absent the Exclusionary Rule,[226] the Fourth Amendment[227] would be nothing more than a bark without a bite.

The criminal codes of our federal system and the states *all* provide for punishment upon conviction of crime. That punishment serves as a means of enforcing the penal codes. The Exclusionary Rule, likewise, is a means of enforcing the rights guaranteed to all citizens of these United States by way of the Fourth Amendment.[228] Absent the Exclusionary Rule, your Petitioner submits, the courts would find themselves in the nebulous position of having to determine the innocence or guilt of the complaining party before deciding whether to exclude unlawfully seized evidence.

Your Petitioner submits that the judgment of the Court of Appeal, Fourth Appellate District, Division Two, State of California, in affirming the trial court, has upheld, as to each issue litigated herein-below, arguments from Respondent that so contrast with this Honorable Court's decisions cited herein and regarding the Fourth Amendment, as to be outrageous. Whether your Petitioner is guilty of the crimes charged was never at issue during the course of Motions to Suppress, below. On the contrary, your Petitioner submits that he is entitled to all the protection afforded to each and every citizen of these United States by way of the Fourth Amendment[229] prior to any determination of innocence or guilt. Respondent, however, has clearly ignored this concept.

For the foregoing reasons, it is respectfully requested that this Honorable Court grant the Writ of Certiorari petitioned for herein.

Respectfully submitted,

GARY W. SMITH
Attorney for Petitioner

[225] *Ibid.*
[226] *Weeks v. United States, 232 U.S. 383 (1914).*
[227] *U.S. Const. amend., IV.*
[228] *Ibid.*
[229] *Ibid.*

# APPENDICES

**COURT OF APPEAL, FOURTH DISTRICT**

**DIVISION TWO**

**STATE OF CALIFORNIA**

| | | |
|---|---|---|
| **PEOPLE OF THE STATE OF CALIFORNIA,** | ) | |
| | ) | E000208, E000217, E000292 |
| **Plaintiff and Respondent,** | ) | (Consolidated Cases) |
| | ) | |
| v. | ) | (Super. Ct. No. 38968) |
| | ) | (Super. Ct. No. 39203) |
| **CHESTER MORTON, et al.,** | ) | |
| | ) | OPINION |
| **Defendants and Appellants.** | ) | |
| | ) | |

APPEALS from the Superior Court of San Bernardino County. William Pitt Hyde and Ben T. Kayashima, Judges. Affirmed.

Gary W. Smith for Defendants and Appellants.

John K. Van de Kamp, Attorney General, Frederick R. Millar, Jr. and Janelle B. Davis, Deputy Attorneys General, for Plaintiff and Respondent.

Based on evidence seized during the execution of three search warrants, defendant Morton was charged with conspiring to manufacture, transport, and sell methamphetamine (Pen. Code, Section 182/Health & Saf. Code, Section 11379, subd. (a)), possessing an opiate for sale (Health & Saf. Code, Section 11351, subd. (a)), and possessing methamphetamine (Health & Saf. Code, Section 11377, subd. (a)). In a separate action, defendants Morton and Quesada were jointly charged with possessing methamphetamine for sale (Health & Saf. Code, Section 11378, subd. (a)), and concealing stolen property recovered in August of 1981 (Pen. Code, Section 496). Morton was individually charged in that separate action with concealing stolen property recovered in December of 1981 (Pen. Code, Section 496). Following a denial of their motions to suppress and quash, Morton pleaded guilty to one count of conspiring to manufacture methamphetamine and one count of concealing stolen property.[1] Quesada pleaded guilty to possessing methamphetamine, a lesser included offense of possessing metham-

[1]Whether Morton pleaded guilty to the August or December concealing count is unclear. As a result, the circumstances underlying each count are the subject of challenge.

phetamine for sale. Bot defendants appeal from the denial of their motions, alleging that the trial court committed several errors with respect to each search warrant. We apply California law in evaluating these allegations becuase the crimes herein charged occurred before the effective date of Proposition 8. (See *People* v. *Smith* (1983) 34 Cal.3d 251, 258.)

## *AUGUST 3rd SEARCH WARRANT*

### FACTS

In early August of 1981, Detective Raymond Rucker of the San Bernardino County Sheriff's Office requested a warrant authorizing the search of a Crestline residence. In support of that request, Rucker drafted an affidavit which provided in pertinent part:

"Deputy (Rick) Roper advised your affiant on August 3, 1981, that a citizen informant had (made observations at 24601 Lake Gregory Drive indicating the possible operation of a clandestine laboratory.)

"(Y)our affiant contacted (the informant) ... and asked him to describe what he had observed .... (The informant) said that on Saturday August 1st, 1981, (he) had driven to the Crestline area from his Whittier home to visit with his son and daughter-in-law, and also at the same time check on the cabin that he owned as a rental in the Crestline area.

"Upon arrival at approx. 1300 hours August 1st, 1981, he noted the outside lights of the cabin to be on. (The informant) states he is personally paying the utilities for this cabin and he wanted to talk to the renter about turning them off. (The informant) said that he smelled a strong sweet odor as he approached the residence, and also felt that there was possibly a burglary, as his front screen door had been removed from the residence. He said he knocked on the front door, received no answer, and started around the rear of the residence, via a catwalk, or sun deck that surrounds the residence.

"As he went around the residence, he noted that on the chaise lounges and furniture sitting on the sun deck were tools and gloves and several packing cases and some long rods that he described as either plastic, or glass, possibly used as some kind of stirring rods. (The informant) said once he arrived at the rear of the residence, the sliding patio door was open; however, the screen door was

closed. He said he yelled to see if anyone was there and noted the strong sweet smell to be even stronger there.

"He said the inside of the residence was in a severe state of disarray, with many more boxes, he described as packing cases, many large crocks, made out of different types of material, and some containers containing white powder.

"Your affiant asked (the informant) for the name of the realtor that had rented the residence and he related the following information. It was through Red Carpet Realty in Crestline with a Jan Stowe Realtor, Phone 338-1766.

"Your affiant subsequently contacted Jan Stowe at approx. 1130 hours August 3rd, 1981 at her office and asked her who she had rented the residence to. She stated it was a subject by the name of Chester Lyndon Morton, who gives a residence address of 1799 West 28th Street, San Bernardino, and a residence phone of 887-4600. She described Morton as in his thirties, approx. 6-0" in height and slender, with long grey and brown hair that is curly and he is a white male adult, clean-cut.

"After receiving all of the aforementioned information from informants, your affiant, Detective Holloway and Special Deputy Centner, drove to the area of 24601 Lake Gregory Drive, in Crestline. Upon arrival, your affiant and Detective Holloway stepped from the Sheriff's vehicle into the roadway in front of the residence and immediately noted a strong odor of ether coming from the residence at 24601 Lake Gregory Drive, in Crestline. Your affiant and Detective Holloway, being aware of the extreme volatile nature of ether and the danger to persons in or around ether, and to remove any doubt as to where the odor was coming from, and to insure the safety of anyone in or around the residence, your affiant and Detective Holloway walked down the brown colored wood stairs to the front door of the residence at 24601 Lake Gregory Drive, in Crestline. Detective Holloway and your affiant then knocked at the front door of the residence and upon getting no reply to the knock, walked on the deck, running to the rear of the residence. Once at the rear of the residence, your affiant and Detective Holloway observed several cardboard boxes, stacked on the deck and a brown bottle containing a liquid substance, dark rubber gloves and glass tubes.

"We then walked to the rear sliding patio door of the residence and through the undraped sliding glass patio door, Detective Holloway and your affiant observed numerous containers of liquid, chemicals, white powder substance and a very strong odor of ether and numerous articles of laboratory equipment. Detective Holloway and your affiant then returned to the Sheriff's vehicle and called for a Sheriff's Patrol unit to remain at the scene of the residence to secure it and prevent anyone from entering the residence.

"Your affiant and Detective Holloway then called for officers from the Sheriff's Crime Laboratory, Sheriff's Identification Detail, and Fire Department Offici(a)ls to assist in the investigation."

Based on this affidavit, a search warrant was issued on August 3, 1981. During its subsequent execution, officers discovered items utilized in the manufacture of methamphetamine. With respect to the August 3rd warrant, Morton contends: (1) the trial court erred in determining that the supporting affidavit established probable cause; (2) the trial court erred in failing to properly determine whether the supporting affidavit contained intentional misstatements and omissions; and (3) the trial court erred in failing to excise from the supporting affidavit affiant's rear deck observations.

## DISCUSSION

### I

Alleging that Rucker's affidavit did not establish the existence of criminal conduct, Morton first contends the trial court erred in determining that this affidavit furnished probable cause to search the Crestline residence. Recognizing that such determinations must be upheld if supported by substantial evidence (*People* v. *Edwards* (1981) 126 Cal.App.3d 447, 452; *People* v. *Manning* (1973) 33 Cal.App.3d 586, 598-599), we consider Morton's contention in light of this standard.

An affidavit establishes probable cause to search when it contains facts making "it substantially probable that there is specific property lawfully subject to seizure presently located in the particular place for which the warrant is sought." (*People* v. *Cook* (1978) 22 Cal.3d67, 84, fn. 6.) In this instance, the affidavit at issue related that a citizen informant and an experienced law enforcement officer had observed tools, gloves, stirring rods, and boxes of white powder in the Crestline

residence. The affidavit also related that the law enforcement officer had smelled ether on or about the premises. Because these facts made it "substantially probable" that items used in the manufacture of controlled substances were present at the residence, the trial court's finding of probable cause is supported by "substantial" evidence.[2]

II

In support of his motions to suppress and quash, Morton asserted that Rucker had intentionally *misstated* the following in his affidavit: (a) that the citizen informant had observed a clandestine laboratory at the Crestline residence; (b) that he had smelled ether in or about the residence upon investigating the informant's report; (c) that he had knowledge of the danger to persons in or about the residence occasioned by the presence of ether; and (d) that he had contacted Fire Department officials to assist. Morton also asserted that because Rucker was not actually concerned about public safety he had intentionally *omitted* material facts from his affidavit. After hearing argument on these points, the trial court found that Rucker's affidavit did not contain material misstatements or omissions. Morton appeals from that finding, contending that the trial court failed to properly apply governing law.

When a defendant believes that a search warrant affidavit contains intentional misstatements, he must prove the existence of such misstatements, as well as prove the affiant's knowledge of their falsity. (*People* v. *Cook, supra,* 22 Cal.3d at 89.) Similarly, when a defendant believes that an affiant has intentionally omitted facts, he must prove the materiality of those omissions. Once such materiality has been established, the trial court must then determine whether the omissions were reasonable, negligent, or intentionally misleading. If reasonable or negligent, the prosecution bears the burden of establishing that they were proper; if intentionally misleading, the defendant bears the burden of establishing the affiant's intent to mislead. (*People* v. *Kurland* (1980) 28 Cal.3d 376, 387-390.)

Having examined Morton's contention in light of these principles, we find it untenable. In determining that Rucker's affidavit did not contain material misstatements or omissions, the trial court effectively concluded that Morton had not met his threshold burdens of proof. Despite defendant's assertions to the contrary, the court was not thereafter required to make any additional findings.

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[2]The odor of ether alone may have justified this finding. (See *People* v. *Osuna* (1985) 85 D.A.R. 1123, 1124; *People* v. *Messina* (1985) 85 D.A.R. 968, 968-969; *People* v. *Siegman* (1985) 164 Cal.App.3d 936, 942-945; *People* v. *Patterson* (1979) 94 Cal.App.3d 456, 462-464.)

III

Morton finally contends that the trial court erred in failing to excise from the supporting affidavit Rucker's rear deck observations. He specifically asserts that these observations were made: (a) during an unlawful confirmatory search, and (b) in violation of his reasonable expectation of privacy. We do not agree.

Upon exiting his vehicle, Rucker immediately smelled a strong odor of ether eminating from the Crestline residence. Recognizing the danger occasioned by the presence of ether, he knocked on the front door of the residence "to remove any doubt as to where the odor was coming from, and to insure the safety of anyone in or around the residence." When no one answered, he walked along a deck to the rear of the residence, noted a very strong odor of ether from that location, and observed both inside and outside the residence items indicating the operation of a clandestine laboratory. He, thereafter called the fire department to assist and secure the residence to prevent anyone from entering it.

Under these circumstances, Rucker's actions were unquestionably proper. Ether is a potentially volatile chemical, and its presence in or about the Crestline residence constituted an exigent circumstance. This exigency, in turn, enabled Rucker to walk onto the rear deck without violating Fourth Amendment proscriptions. (*People* v. *Osuna, supra,* 85 D.A.R. at 1124; *People* v. *Messina, supra,* 85 D.A.R. at 968-969; *People* v. *Stegman, supra,* 164 Cal.App.3d at 943-945; *People* v. *Patterson, supra,* 94 Cal.App.3d at 462-464. See also *People* v. *Ramey* (1976) 16 Cal.3d 263, 276.) From that vantage point, the items described in the affidavit were in plain view.

*AUGUST 4th SEARCH WARRANT*

FACTS

Immediately after execution of the first search warrant, Detective Donald Hankerson of the San Bernardino County Sheriff's Office requested a warrant authorizing the search of Morton's San Bernardino residence. In support of that request, Hankerson drafted an affidavit which provided in pertinent part:

> "On Monday, August 3, 1981, your affiant assisted Detective Rucker in the service of a search warrant signed by Judge David Press from the Crest Forest Judicial Court. The search warrant was served at 24601 (*sic*) Lake Gregory Drive in the Crestline area, County of San Bernardino, State of California.

"During the search of the residence, your affiant found a large clandestine laboratory with chemicals, books, heaters, narcotic formula notations, filters and filter papers and other items used in a clandestine laboratory. Further investigation revealed rent receipts for the residence with the name Chester Lyndon Morton on it with rent paid up until August 1981. The address on the rent receipt for Chester Morton was 1799 W. 28th Street, San Bernardino with a driver's license #M0074955.

"Detective Rucker contacted a Jan Stowe on Monday, August 3, 1981 and she stated that she was a realtor for the Red Carpet Realtors in the Crestline area. She stated to Detective Rucker that she had rented the residence at 24601 Lake Gregory Drive to a subject known as Chester Lyndon Morton. And that he had given the above listed address and driver's license number.

"Your affiant ran a records check on a Chester L. Morton and it revealed that his address was 1799 W. 28th Street in San Bernardino, California and that his driver's license was M0074955.

"Other papers located at the Lake Gregory Drive address revealed the names of Steven Goode and Candace Cornell. There was a receipt from the Radio Shack, a receipt from Leo's Stereo and a copy of a birth certificate with the name Steven Goode on it. There was also a receipt from a storage unit in the Laguna Hills area with the name Candy Cornell on it.

"A further search revealed a rent receipt for a residence located at 19330 Sagebrush Trails in the Desert Hot Springs area of California.

"Your affiant talked to Detective Bob Doyle from the Riverside County Sheriff's Office, Desert Hot Springs Station on Tuesday, 8-4-81. Your affiant was inquiring about the residence on the Sagebrush Trails in the Desert Hot Springs area. Detective Doyle told your affiant that on June 25, 1981 he had served a search warrant at that residence and found a clandestine laboratory within the residence. Detective Doyle also told your affiant that during the search of the residence he found papers inside the residence with the names Candace Cornell and Steven Goode on them. He stated there was a rent receipt for the residence with the name Steven Goode on it.

"A further search revealed a rent receipt for a residence located at 19330 Sagebrush Trails in the Desert Hot Springs area of California.

"Your affiant talked to Detective Bob Doyle from the Riverside County Sheriff's Office, Desert Hot Springs Station on Tuesday, 8-4-81. Your affiant was inquiring about the residence on the Sagebrush Trails in the Desert Hot Springs area. Detective Doyle told your affiant that on June 25, 1981 he had served a search warrant at that residence and found a clandestine laboratory within the residence. Detective Doyle also told your affiant that during the search of the residence he found papers inside the residence with the names Candace Cornell and Steven Goode on them. He stated there was a rent receipt for the residence with the name Steven Goode on it.

> "It has been your affiant's experience that subjects involved in the illicit manufacture and/or possession of narcotics often hide the substance and paraphernalia for manufacturing in their homes, on their persons and in their vehicles away from the actual laboratory operation. Further, it has been my experience that subjects involved in the clandestine laboratories will manufacture the drugs at one location (*sic*) and take it to another location. It has also been your affiant's experience that subjects involved in the manufacture of illicit drugs will have narcotic formulas, business ledgers and other documents pertaining to narcotic transactions on their person, in their residence and in their vehicles, also other documents which tend to identify those people involved and other co-conspirators (*sic*). It has also been your affiant's experience that people that rent residences for the purpose of manufacturing illicit drugs will not live in those residences, they just use them to manufacture the drugs and then take the finished product to a different residence. It is your affiant's opinion that with the above facts listed, that now located at 1799 W. 28th Street in the City of San Bernardino, County of San Bernardino, State of California, there is now being possessed for sale a quantity of Methamphetamines, MDT, all which tend to show that a felony is being committed in the City of San Bernardino, County of San Bernardino, State of California."

Based on this affidavit, a search warrant was issued on August 4, 1981, and executed while Morton and Quesada were present in the subject residence. During that execution, officers discovered 122 items not specified in the warrant that they believed were stolen. Via radio transmission, they confirmed their suspicions with respect to certain

items and then seized each of the 122 items. After ascertaining that Quesada lived in the residence, officers also searched her purse and seized a small quantity of methamphetamine discovered therein. With respect to the August 4th warrant, Morton and Quesada jointly contend: (1) the trial court erred in determining that the supporting affidavit established probable cause, and (2) the trial court erred in refusing to find that officers had exceeded the scope of their authority by seizing items not specified in the warrant. Quesada separately contends that officers exceeded the scope of their authority by searching her purse.[3]

## DISCUSSION

### I

Morton and Quesada first contend the trial court erred in determining that Hankerson's affidavit furnished probable cause to search the 28th Street residence. According to defendants, the affidavit neither established that Morton lived at the aforementioned residence, nor established that this residence housed the property sought to be seized. Recognizing again that a finding of probable cause must be upheld if supported by substantial evidence (*People* v. *Edwards, supra,* 126 Cal.App.3d at 452; *People* v. *Manning, supra,* 33 Cal.App.3d at 598-599), we consider defendant's contention in light of this standard.

Hankerson related in his affidavit the following facts: (a) that Morton had rented a Crestline residence; (b) that the residence had been searched on August 3rd; (c) that this search had, among other things, resulted in the discovery of a clandestine laboratory and a rental receipt for a Desert Hot Springs residence; (d) that the Desert Hot Springs residence had been searched; and (e) that this search had resulted in the discovery of a clandestine laboratory. Hankerson also related that he ran a records check on Morton and determined that he resided at 1799 West 28th Street in San Bernardino. Despite defendant's assertions to the contrary, these facts make it "substantially probable" that Morton resided at the 28th Street residence and that this residence contained items used in the manufacture of methamphetamine (See *People* v. *Cook, supra,* 22 Cal.3d at 84, fn. 6.) This probability, in turn, compels a finding that the trial court's probable cause determination is supported

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[3]Asserting that the August 3rd search warrant was improperly issued, defendants also contend that items discovered during execution of that warrant were "fruits of the poisonous tree" and hence, should not have been included in the affidavit supporting the August 4th warrant. Having previously determined that the August 3rd warrant was properly issued, we summarily reject this contention.

by "substantial evidence."

II

Morton and Quesada next contend the trial court erred in refusing to find that officers had exceeded the scope of their authority by "seizing" items not specified in the warrant. The contested "seizure" allegedly occurred when officers picked up the items for the purpose of noting their brand names and/or serial numbers. We discern no error.

California courts have consistently held that officers may seize items not specified in a warrant if those items are "determined to be contraband through radio identification by an official source." (*Nunes* v. *Superior Court* (1980) 100 Cal.App.3d 915, 931. See also *People* v. *Sedillo* (1982) 135 Cal.App.3d 616, 623; *People* v. *Murray* (1978) 77 Cal.App.3d 305, 310.) In order to make such a determination, officers have a corollary right to examine items for characteristic markings, the exercise of which does not even consitute a search or seizure (*People* v. *Orlosky* (1974) 40 Cal.App.3d 935, 938; *People* v. *Superior Court* (1969) 2 Cal.App.3d 131, 134-135; see also *People* v. *Roberts* (1956) 47 Cal.2d 374, 380), let alone an illegal one. (*People* v. *Fitzen* (1974) 43 Cal.App.3d 253, 258, fn. 3.) This is especially true when, as here, the quantity and/or placement of items indicates that they obviously were not on the scene for ordinary use. (See *People* v. Eitzen, supra, 43 Cal.App.3d 257, at 257-258. See also 2 LaFave, Search & Seizure, Section 4.11, p. 172.)

Having determined the precise authority possessed by executing officers, we reach the following conclusions with respect to their conduct in this instance: to the extent that the officers removed items from Morton's home without first identifying them as stolen property, they exceeded the scope of their authority. The "nexus" required between these items and criminal behavior was simply not established. (See *People* v. *Hill* (1974) 12 Cal.3d 731, 761-762, overruled on other grounds *People* v. *DeVaughn* (1977) 18 Cal.3d 889, 896: *Nunes* v. *Superior Court, supra,* 100 Cal.App.3d at 926-933.) Because the appropriate remedy for such conduct is, however, suppression of the items (see *People* v. *Superior Court (Meyers)* (1979) 25 Cal.3d 67, 75, fn. 7, 79), our conclusion does not inure to the benefit of either defendant here. Morton pleaded guilty to concealing property that was properly identified as contraband via radio transmission *before* it was removed. Quesada, on the other hand, did not even plead guilty to the concealing charge.

III

Quesada separately contends the trial court erred in refusing to find that officers had exceeded the scope of their authority by searching her purse. We reject this contention outright, noting that law enforcement officers may search a resident's personal effects and receptacles when, as here, those articles might reasonably contain items described in the warrant. (See *People* v. *Saam* (1980) 106 Cal.App.3d 789, 794.)

*DECEMBER 14th SEARCH WARRANT*

FACTS

In mid-December of 1981, Detective Louis Perry of the San Bernardino County Sheriff's Office requested another warrant authorizing the search of Morton's San Bernardino residence. In support of that request, Perry drafted an affidavit which provided in pertinent part:

"On about August 3, 1981, Detective RUCKER of the San Bernardino Sheriff's Office Narcotics and Selective Investigations Division, served a Search Warrant on a residence located at 24601 (*sic*) Lake Gregory Drive, Crestline, where a clandestine methamphetamine laboratory was in operation. Subsequent to serving that Search Warrant, a second Search Warrant was served on the home of Chester Lindon (*sic*) MORTON at 1799 West 28th Street, San Bernardino, California. At that 28th Street home, numerous items of evidence linking Chester MORTON to a conspiracy to manufacture and distribute methamphetamines were seized. Subsequent to the service of the Search Warrant at 1799 West 28th Street, and the arrest of Chester MORTON, I have received information from an unproven informant that MORTON is still dealing large quantities of methamphetamines. Further, I conducted an interview with Chester MORTON subsequent to his arrest wherein he admitted his participation in a conspiracy to distribute methamphetamines and association with Sean FAHY, a wanted fugitive, and manufacturer of controlled substances.

"On December 14, 1981, I conducted an interview with a reliable Confidential Informant, who advised me that he is to purchase between two and four ounces of methamphetamine from a subject named Michael APPELLO for approximately $1400.00 per ounce, on 12-1-- at about 1800 hours. The RC/I further advised

on December 3, 1981, he purchased a sample of methamphetamine (approximately one-quarter gram) for $25.00 from Michael APPELLO. That sample (*sic*) purchase was made in furtherance of the larger purchase and investigation. On that December 3, 1981, meeting, Michael APPELLO was alledged (*sic*) to have shown the RC/I a tripple (*sic*) beam scale, and shown him how to use it to weigh (*sic*) narcotics for resale.

"On December 12, 1981, in the evening, the RC/I again met with Michael APPELLO, Shirley WINTERS and others to firm up the quantity of narcotics to be purchased on December 14, 1981, and the price. The RC/I and the suspects remained at their meeting place until after 0200 hours on 2-13-81, when they went to Sambo's Restaurant on Highland Avenue, in San Bernardino. The RC/I was asked by Michael APPELLO to deliver him to that location. While there, a WMA introduced as "CHET," driving a bronze 1975 Corvette, California license #185UGE, arrived, sat down with the RC/I, Michael APPELLO and others. While there, the RC/I overheard Michael APPELLO tell "CHET" that the RC/I was the subject he was selling the methamphetamine to Monday night (12-14-81). Prior to APPELLO making that statement, the RC/I heard "CHET" say to APPELLO that his "stuff" was ready that he (APPELLO) needed for Monday night. The RC/I had heard APPELLO call methamphetamine "stuff" on prior occasions — I have also heard narcotics substances referred to as "stuff."

"During that meeting, "CHET" produced a clear plastic baggie containing a white powder (suspected controlled substance) and offered the RC/I some, which he declined. "CHET" also related that he had just returned from processing the substance offered. The RC/I said that though he has heard both Michael APPELLO and Shirley WINTERS speak of "CHET" in the past, that was the first time he has met him. During the past references to "CHET," both WINTERS and APPELLO have told the RC/I that he had good speed and coke. The RC/I also heard APPELLO tell WINTERS on a prior occasion that he (APPELLO) was enroute to meet with "CHET" to get some "stuff" to take to the North Fortys Bar and deliver.

"I showed the RC/I a photograph line-up containing six male subjects, and asked if he recognized anyone depicted. The RC/I said without hesitation that subject #5 was the "CHET" he was speaking of. Subject #5 is Chester MORTON. Further, the 1975

bronze Corvette 185UGE driven by CHET belongs to MORTON and was claimed by MORTON to have been a gift from Sean FAHY. During the search of MORTON's home on 8-4-81, a large quantity of methamphetamine was seized.

"It has been your Affiant's experience that subjects involved in the illcit manufacture and/or possession of narcotics often hide these substances and paraphernalia for manufacture in their homes, on their persons, and in their vehicles. Further, it has been my experience that involved subjects also possess in their homes, vehicles, and on their persons, narcotics formulas, business ledgers pertaining to narcotics transactions, and other documents tending to identify other persons involved.

"It has been your Affiant's experience that persons involved in trafficking and manufacturing narcotics often use false names and addresses to hide their identities and illegal businesses. Telephone toll information is often crucial in successfully investigating such criminal activity.

"It has also been my experience that persons involved in the illegal manufacture of controlled substances often possess false identification, operate vehicles registered in names other than their own, use intermediaries to conduct their illegal business, use post office boxes, and use false physical addresses to conceal their true identities and physical locations."

Based on this affidavit, a search warrant was issued and executed on December 14, 1981. During that execution, a handgun not specified in the warrant was discovered behind a stereo and seized after officers determined via radio transmission that it has been stolen. With respect to the December 14th warrant, Morton contends: (1) the trial court erred in determining that the supporting affidavit established probable cause, and (2) the trial court erred in refusing to find that officers had exceeded the scope of their authority by seizing an item not specified in the warrant.[4]

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[4]Asserting that the August 3rd and 4th search warrants were improperly issued and/or executed, Morton also contends that items discovered pursuant to those warrants were "fruits of the poisonous tree" and hence, should not have been included in the affidavit supporting the December 14th warrant. Having previously determined that the August 3rd and 4th warrants were properly issued as well as executed, we summarily reject this contention.

## DISCUSSION

I

According to Morton, Perry's affidavit contains stale facts, "conclusionary" language, information reported by unreliable informants, and admissions obtained in violation of *Miranda* v. *Arizona* (1966) 384 U.S. 436. Citing these reasons, Morton contends the trial court erred in determining that this affidavit established probable cause to search. We consider each alleged defect in turn.

Morton characterizes as stale the following facts: (a) the circumstances surrounding the August 3rd and 4th searches; (b) his admission made on September 24th; and (c) the undated information provided by the "unproven informant." We do not agree. To successfully avoid a staleness claim, facts must be so closely related to the time of the warrant's issuance that a magistrate would be justified in entertaining a strong suspicion that contraband is still present in the place to be searched. (See *Sgro* v. *United States* (1932) 287 U.S. 206, 210.) No clear cut rule, however, specified when the time span must be deemed too attenuated. Each case must instead be judged on its own facts. (See *Alexander* v. *Superior Court* (1973) 9 Cal.3d 387, 393.) In this instance, the allegedly stale facts provided the magistrate with background information and indicated the presence of a continuous course of criminal conduct. Accordingly, while the warrant was issued a number of months after those facts were received, we cannot in good faith adopt the proffered characterization.

Morton also characterizes as "conclusionary" Perry's statements concerning the tendency of illicit drug manufacturers to utilize false names and hide contraband in their places of residence. We reject this contention outright, noting that these statements were based on Perry's personal knowledge and experience acquired during his assignment with the sheriff's narcotics division.

Morton next insists that Perry did not state facts in his affidavit from which the magistrate could reasonably have concluded that the informants were credible or reliable. (See *People* v. *Hamilton* (1969) 71 Cal.2d 176, 180.) While this point is well taken, credibility and reliability may be established by corroboration. Corroboration may, in turn, be established when two informants make independent, but consistent, reports. (See *People* v. Sheridan (1969) 2 Cal.App.3d 483, 489. See also *People* v. *Fein* (1971) 4 Cal.3d 747, 753.) Because such reports were made by the informants in this instance, the trial court properly considered them in determining the existence of probable cause.

Penultimately, Morton asserts that his September 24th admission should not have been included in Perry's affidavit because it was obtained in violation of *Miranda* v. *Arizona, supra.* In order to evaluate the validity of this assertion, we must first determine whether Morton was "in custody" at the time the admission was made. For purposes of assessing a *Miranda* violation, an individual is in custody when he is "physically deprived of his freedom of action in any significant way or (was) led to believe, as a reasonable person, that he (was) so deprived." (*People* v. *Arnold* (1967) 66 Cal.2d 438, 448.) In this instance, Perry contacted Morton by telephone after Morton had been charged with concealing stolen property and released on bail but before he had obtained counsel. During the ensuing conversation, Perry asked Morton to come to the police station to discuss the charges against him. Morton complied, and without first having been advised of his *Miranda* rights, he admitted that he was involved in a conspiracy to manufacture methamphetamine. He thereafter left the station. Under these circumstances, we fail to discern how Morton was actually or constructively deprived of his freedom of action. Despite Morton's assertions to the contrary, his admission was not elicited in a custodial setting and was, therefore, properly included in the supporting affidavit.

Having determined that none of the alleged defects exist, we conclude that the trial court's probable cause determination did not constitute error.

II

Morton finally contends the trial court erred in refusing to find that officers had exceeded the scope of their authority by seizing the handgun. For reasons stated on pages 13 through 15 of this opinion, we discern no error.

The judgments are affirmed.

*NOT FOR PUBLICATION*

Rickles

J.

We concur:

Morris

P.J.

McDaniel

J.

## APPENDIX B

I. PROCEEDINGS BELOW

A. The Conspiracy Case

On or about February 12, 1982, a criminal complaint was filed in the San Bernardino County Municipal Court, Central Division, in Case No. FSB 25441, accusing Petitioner (and others not parties herein) of:

Count 1: Conspiracy to manufacture, transport and sell a controlled substance in violation of *Penal Code*, Section 182 and *Health & Safety Code*, Section 11379 (a) (further, alleging ten (10) overt Acts);

Count 2: Possession for sale of a narcotic in violation of *Health & Safety Code*, Section 11351 (a);

Count 3: Possession of a controlled substance in violation of *Health & Safety Code*, Section 11377 (a);

Count 4: (not related to Petitioner).

Petitioner was arraigned on or about February 20, 1981. Preliminary Examination was held on the dates of April 13, 14, 15, 22 and 23, 1982.

On or about May 7, 1982, an Information was filed in the Superior Court, Case No. SCR 38968, accusing Petitioner (and others who are not parties herein) of:

Count 1: Conspiracy to manufacture, transport, and sell a controlled substance in violation of *Penal Code*, Section 182 and *Health & Safety Code*, Section 11379 (a);

Count 2: Possession for sale of a narcotic in violation of *Health & Safety Code*, Section 11351 (a);

Count 3: Possession of a controlled substance in violation of *Health & Safety Code*, Section 11377 (a).

Between July 15, 1982, and August 17, 1982, Motions to Suppress Evidence and to Dismiss the Information were heard before the HONORABLE FENTON E. JONES. The court tentatively denied each motion, but these judgments were never given finality by Judge Jones.

B. The Stolen Property Case

On or about September 2, 1981, a criminal complaint was filed in the San Bernardino County Municipal Court, Central Division, accusing Petitioner of:

Count 1: Concealing stolen property in violation of *Penal Code*, Section 496;

On or about January 20, 1982, said criminal complaint was amended to provide,

Count 3: Concealing stolen property in violation of *Penal Code*, Section 496.

Petitioner was arraigned on or about September 28, 1982. Prelimi-

nary Examination was held on the dates of June 10, 22, 25 and 28, 1982.

On or about July 12, 1982, an Information was filed in Superior Court, Case No. SCR 39203, accusing Petitioner of:

Count 1: Concealing stolen property in violation of *Penal Code*, Section 496, on August 4, 1981; and

Count 3: Concealing stolen property in violation of *Penal Code*, Section 496, on December 14, 1981.

On or about October 25, 1982, counsel for Petitioner filed a Substitution of Attorneys in both Superior Court cases. At that time, the motions filed in SCR 38968 had been completed.

On or about November 17, 1982, scheduled hearings on motions in SCR 39203 were continued until January 12, 1982. At that time, counsel for Petitioner represented to the court that he was of the opinion that numerous issues that should have been raised were not litigated by defense counsel in SCR 38968. The Deputy District Attorneys representing Respondent in SCR 38968 and SCR 39203, respectively, stipulated that the record in SCR 39203, resulting from noticed motions and hearings thereon, would be the record on appeal in SCR 38968, as well. The stipulation provided, in the event Petitioner argued issues in SCR 39203 that were not litigated in SCR 38968, Respondent would be granted additional time to supplement responsive pleadings to address those issues.

Beginning February 23, 1983, and continuing on various dates through June 9, 1983, Petitioner's Motions to Suppress Evidence were heard before the HONORABLE WILLIAM PITT HYDE. Said motions were denied.

On or about July 27, 1983, pre-trial conference in SCR 38968 and SCR 39203 was calendared, with the HONORABLE BEN T. KAYASHIMA, Judge of the Superior Court, presiding. Said pre-trial conference was continued until August 3, 1983.

On or about August 3, 1983, before the HONORABLE BEN T. KAYASHIMA, Petitioner entered a Change of Plea pleading guilty to concealing stolen property in violation of *Penal Code*, Section 496; and violation of *Penal Code*, Section 182 and *Health & Safety Code*, Section 11379 (a), conspiracy to manufacture and/or distribute a controlled substance. Pursuant to said Change of Plea, the court agreed that the maximum time Petitioner would serve in custody would be three (3) years, eight (8) months. The matter was referred to the Probation Department and scheduled for hearing on August 31, 1983 which was continued until September 7, 1983.

On or about September 7, 1983, the HONORABLE BEN T. KAYASHIMA pronounced judgment upon Petitioner and imposed a

sentence of three (3) years, eight (8) months in state prison for violation of *Penal Code*, Section 182 and *Health & Safety Code*, Section 11379 (a), conspiracy to manufacture and/or distribute a controlled substance, in SCR 38968; and violation of *Penal Code*, Section 496, concealing stolen property in SCR 39203. The matter was continued until September 21, 1983, for a hearing on Petitioner's Motion for Bail Pending Appeal, which was granted on said date. In the interim, and on or about September 19, 1983, Petitioner submitted for filing a Notice of Appeal; Request for Reporter's and Clerk's Transcripts on Appeal; and Request for Order Setting Bail on Appeal as to both SCR 38968 and SCR 39203. Said notice was filed with the Clerk of the Superior Court on or about October 13, 1983.

Upon appeal, SCR 38968 was assigned Case No. E000208, and SCR 39203 became E000217. On or about January 20, 1984, said cases were consolidated by order of the Court of Appeal, Fourth Appellate District, Division Two, State of California.

On or about October 25, 1984, Petitioner filed an Opening Brief on Appeal, portions of which are quoted or referenced herein, and are located within footnotes or the Appendices.

On or about January 22, 1985 Respondent filed a Response Brief.

Oral Argument was heard on May 7, 1985.

On or about May 16, 1985, the Court of Appeal, Fourth Appellate District, Division Two, filed a written Opinion, which was "Not for Publication" (Appended hereto, Appendix 1). Said Opinion was written by the HONORABLE ROBERT E. RICKLES, Associate Justice. Applying California law, the Court affirmed the judgments of conviction of Petitioner (and his co-appellant, not a party herein).

The Opinion of the Court of Appeal omitted several issues raised by Petitioner upon appeal. In addition, the Opinion omitted numerous crucial facts, including extensive and undisputed expert testimony offered by Petitioner's witness with respect to a probable cause determination based upon the smell of ether.

Further, said Opinion misstated crucial facts, which your Petitioner alleges would, if correctly stated, be cause for reversal.

In response thereto and on or about June 25, 1985, Petitioner submitted for filing a Petition for Review to the Supreme Court of the State of California. Said Petition was filed on or about July 1, 1985.

On or about August 28, 1985, the California Supreme Court denied review, without opinion.

The decision of the Court of Appeal became final, and judgement was entered on or about August 30, 1985.

This Petition for Writ of Certiorari follows.

FN 1

**IN THE CREST FOREST JUDICIAL DISTRICT**
**COUNTY OF SAN BERNARDINO, STATE OF CALIFORNIA**

STATE OF CALIFORNIA ) AFFIDAVIT
) IN SUPPORT OF SEARCH
COUNTY OF SAN BERNARDINO) WARRANT

Personally appeared before me this 3rd day of August, 1981, RAYMOND B. RUCKER, Jr., a duly authorized Deputy Sheriff for the County of San Bernardino.

WHO on oath, makes complaint and deposes and says: The information contained in this affidavit is for the purpose of securing a search warrant for the premises and property herein described.

Your affiant states that he is now and has been for the past six and a half years, a deputy sheriff for the County of San Bernardino and is currently assigned as a detective in the Narcotics & Selective Investigation Division, and has been so assigned since December, 1980. I have participated in investigations of illegal clandestine laboratories and am familiar with chemicals needed and used in the manufacture of PCP and Methamphetamine.

PROBABLE CAUSE FOR ISSUANCE OF SEARCH WARRANT:

On August 3rd, 1981, your affiant was contacted by Deputy Rick Roper, concerning information he had received from a citizen informant, involving a possible clandestine laboratory operation in the Crestline area of the San Bernardino Mountains. Deputy Roper has been for the past six years a regular deputy for the County of San Bernardino, and is currently assigned to the Twin Peaks Substation of the San Bernardino County Sheriff's Office.

Deputy Roper advised your affiant on August 3rd, 1981, that a citizen informant had supplied him with information, concerning a residence that the informant ownes in the Crestline area that was possibly involved in a clandestine laboratory operation. Deputy Roper related the following information that he received from the citizen informant.

The citizen informant had driven to the Crestline area to visit with family members and at the same time drove to the area of a house that he ownes and is currently used as a rental at 24601 Lake Gregory Drive, in Crestline. The citizen informant stated that he had observed outside lights on at approx. 1300 hours of Saturday August 1st, 1981. He states that the informant is paying utilities on the building and felt this was a

waste of electricity and that the informant went to the residence, in order to talk to the renter about turning the lights off.

The informant felt that there was possibly a burglary having been committed at the residence; as the front screen door had been removed from the residence. He then walked around the residence via a catwalk, or sun deck, and upon arriving at the rear of the residence, where a sliding patio is located, he noted that the door was open and the screen door was closed.

The informant told Deputy Roper that he smelled a sweet smell at this time, and looked inside and saw a lot of packing boxes and crocks with white powder in them sitting around the residence and the interior of the residence in a state of disarray.

Deputy Roper advised your affiant of the citizen informant's name and telephone number and stated that he would relate any futher information that he could recall.

On August 3rd, 1981 at approximately 1100 hours, your affiant contacted a RICHARD MARVICH via landline, at Area Code 213-583-2834, which is the work phone number for Mr. Marvich.

Your affiant told Mr. Marvich who he was and asked him to describe what he had observed at his rental house in Crestline. Mr. Marvich said that on Saturday August lst, 1981 Mr. Marvich had driven to the Crestline area from his Whittier home to visit with his son and daughter-in-law, and also at the same time check on the cabin that he owned as a rental in the Crestline area.

Upon arrival at approx. 1300 hours August 1st, 1981. he noted the outside lights of the cabin to be on. Mr. Marvich states he is personally paying the utilities for this cabin and he wanted to talk to the renter about turning them off. Mr. Marvich said that he smelled a strong sweet odor as he approached the residence. and also felt that there was possibly a burglary, as his front screen door had been removed from the residence. He said he knocked on the front door, received no answer. and started around the rear of the residence, via a catwalk, or sun deck that surrounds the residence.

As he went around the residence, he noted that on the chaise lounges and furniture sitting on the sun deck were tools and gloves and several packing cases and some long rods that he described as either plastic, or glass, possibly used as some kind of stirring rods. Mr. Marvich said once he arrived at the rear of the residence, the sliding patio door was open; however, the screen door was closed. He said he yelled to see if anyone was there and noted the strong sweet smell to be even stronger there.

He said the inside of the residence was in a severe state of disarray, with many more boxes, he described as packing cases, many large crocks, made out of different types of material, and some containers

containing white powder. I asked Mr. Marvich if he was familiar with the smell of ether and he said, No he is not, he would not know for sure if he was smelling ether, or if he was not. Mr. Marvich said he was very upset about the condition of the interior of the residence and left, with his intentions to call the realtor that rented the residence for him and to tell him to evict the tenants.

Mr. Marvich states that he did leave and made subsequent contact with his son and daughter-in-law, telling them what he had observed and they advised him that he should contact the Sheriff's Office, which he subsequently did so on the morning of August 3rd, 1981.

Mr. Marvich told your affiant that he ownes the property at 24601 Lake Gregory Drive, Crestline, and that he is currently paying the utilities on the same residence. Mr. Marvich said he would cooperate with law enforcement officers in any way necessary, including testifying in court as to his observations.

Your affiant asked Mr. Marvich for the name of the realtor that had rented the residence and he related the following information. It was through Red Carpet Realty in Crestline with a Jan Stowe Realtor, Phone 338-1766.

Your affiant subsequently contacted Jan Stowe at approx. 1130 hours August 3rd, 1981 at her office and asked her who she had rented the residence to. She stated it was a subject by the name of Chester Lyndon Morton, who gives a residence address of 1799 West 28th Street, San Bernardino, and a residence phone of 887-4600. She described Morton as in his thirties, approx. 6'0" in height and slender, with long grey and brown hair that is curly and he is a white male adult, clean-cut.

Mrs. Stowe could not provide any further information, other than the driver's license number of suspect MORTON as M0074955. Mrs. Stowe further advised that Morton has the rent paid until the 19th of August, 1981.

After receiving all of the aforementioned information from informants, your affiant, Detective Holloway and Special Deputy Centner, drove to the area of 24601 Lake Gregory Drive, in Crestline. Upon arrival, your affiant and Detective Holloway stepped from the Sheriff's vehicle into the roadway in front of the residence and immediately noted a strong odor of ether coming from the residence at 24601 Lake Gregory Drive, in Crestline. Your affiant and Detective Holloway, being aware of the extreme volatile nature of ether and the danger to persons in or around ether, and to remove any doubt as to where the odor was coming from, and to insure the safety of anyone in or around the residence, your affiant and Detective Holloway walked down the brown colored wood stairs to the front door of the residence at 24601

Lake Gregory Drive, in Crestline. Detective Holloway and your affiant then knocked at the front door of the residence and upon getting no reply to the knock, walked on the deck, running to the rear of the residence. Once at the rear of the residence, your affiant and Dectective Holloway observed several cardboard boxes, stacked on the deck and a brown bottle containing a liquid substance, dark rubber gloves and glass tubes.

We then walked to the rear sliding patio door of the residence and through the undraped sliding glass patio door. Detective Holloway and your affiant observed numerous containers of liquid, chemicals, white powder substance and a very strong odor of ether and numerous articles of laboratory equipment. Detective Holloway and your affiant returned to the Sheriff's vehicle and called for a Sheriff's Patrol unit to remain at the scene of the residence to secure it and prevent anyone from entering the residence.

Your affiant and Detective Holloway then called for officers from the Sheriff's Crime Laboratory, Sheriff's Identification Detail, and Fire Department Officials to assist in the investigation.

PROPERTY TO BE SEIZED:

The following items are commonly used in the illicit manufacture of Methamphetamine:

1. Phenylacetone
2. Methylamine
3. Methanol
4. Sodium Acetate
5. Hydrogen
6. Palladium Black
7. Potassium Hydroxide
8. Ether
9. Hydrochloric Acid
10. Lithium Aluminum Hydride
11. Ephedrine
12. Hydrogen Iodide
13. Zinc or tin foil

Also the following chemicals that are used in the illicit manufacture of PCP.

1. Phencyclidine
2. Cyclohexanone
3. Piperidine
4. Bromobenzene
5. Sodium Cyanide
6. Hydrochloric Acid
7. Sodium Bisulfate
8. Sodium Hydroxide
9. Ether
10. Magnesium Turnings.
11. Any combination of product of any and all above chemicals. Also any and all laboratory equipment.
12. Also papers, documents, correspondence and receipts, showing the person or persons having ownership and/or control of the residence, vehicles, and any papers tending to show a conspiracy between any John and/or Jane Doe.

PREMISES TO BE SEARCHED:

The premises including, but not limited to; (1) the residence and properties located at 24601 Lake Gregory Drive, Crestline, County of San Bernardino, State of California. The residence being located on Lake Gregory Drive, on the east, or lower side of the street. The residence being a single story residence, brown in color, wood frame and wood siding with a wood shingle roof. The numbers 24601 are located by an entry way at the street way entrance to the residential property, and also the name Marvich. The numbers and letters are black in color.

AFFIANT'S EXPERTISE:

Your affiant attests that he is now and has been a duly authorized Deputy Sheriff for the County of San Bernardino, State of California, since October of 1974 and since December 1980, your affiant has been assigned as a Detective in the Sheriff's Narcotics and Selective Investigations Division. Your affiant states that he has attended a one and a half hour In-Service Training Course, instructed by Sergeant D'Amico and Sergeant Pat English of the San Bernardino County Sheriff's Office in the clandestine laboratory operations. Your affiant has participated in numerous investigations, pertaining to illicit manufacture of PCP and Methamphetamine and has participated in preparation of Search Warrants, pertaining to the illicit manufacture of PCP. Your affiant has entered into conversation with Sergeant Felix D'Amico of the Sheriff's Narcotic & Selective Investigations Detail, Detective Don Hankerson, Narcotics & Selective Investigations Detail and Sergeant Virgil Merritt of Big Bear Substation, formerly of the Narcotics & Selective Investigations Detail, all of whom are experts in the area of clandestine laboratory operations.

The above officers have given this officer training and intelligence information to help your affiant identify laboratory operations and the chemicals involved. Your affiant states that he has smelled ether on numerous occasions, including, but not limited to, in hospitals, where it has been administered to your affiant by doctors present for surgery.

It has been your affiant experience that subjects involved in the illicit manufacture and/or possession of narcotics often hide the substances and paraphernalia for manufacture in their homes, on their persons and in their vehicles, away from the actual laboratory operation. Further it has been my experience that involved subjects also possess in their homes, vehicles, and/or their persons, narcotic formulas, business ledgers, pertaining to the narcotic's transactions, and other documents which tend to identify other involved persons. I have reviewed with Sergeant Feaster of the San Bernardino County Sheriff's Office Narco-

tic's & Selective Investigation's Detail and Detective Holloway of the Narcotics & Selective Investigation's Detail, and Detective Daniel Tidwell of the Narcotics & Selective Investigations Detail, my reasons for believing that there is now a clandestine laboratory located at 24601 Lake Gregory Drive, Crestline, California.

And this complainant prays that a search warrant may be issued to search for the same, and that the same may be brought before a magistrate and disposed of according to law.

_____

_____

_____

Subscribed and sworn to before me this 3rd Day of August, 1981

_____

Judge of the Crest Forest Justice
Court District
County of San Bernardino
State of California.

After having contacted the realtor who advised him that she would indeed get in touch with the people that had rented it. He said that he talked with his son and his daughter-in-law telling them what he had observed and they advised him that he should get in contact with the Sheriff's Office *as they felt* there was some type of illegal laboratory operation involving drugs possibly involved.

FN 3

Further, Petitioner submitted, the owner had not concerned himself with his alleged discovery for a period of two days prior to his contact with the Affiant; and then only after his son and daughter-in-law advised him to contact the Sheriff's Office, because of *their* belief that what the owner saw may have been an illegal drug lab.

FN 4

The next claimed misstatement is that a citizen informant gave information "involving a possible clandestine laboratory operation." Defendant claims the informant said no such thing, that those words are probably the officer's interpretation of the information. Defendant's claim is probably untrue because in his police report of the interview with the informant (the property owner) the affiant states that the

informant was told to contact the sheriff's office by his relatives who suspected a drug laboratory may be in operation. So the informant may very well have said that when he called in.

"Even if the phrase is the affiant's interpretation, so what? It is an interpretation he is qualified to make and he confirmed it by interview of the informant and observation of the premises. It, therefore, is not an interpretation significant to the question of probable cause and is harmless according to the rules laid out in *People v. Caffott*, 105 Cal.App.3d 775, 781-785.

**FN 8**

(Mr. McCormick) . . .

Q. Did Mr. Marvich inform you that he thought a lab, a clandestine lab, was being used to produce drugs in his cabin?

A. No, sir.

**FN 9**

The Court stated: ". . . there are not any misstatements, or omissions with regard to the warrant, at least to the point where it would affect the sufficiency of the Affidavit to support the warrant, and would not affect or mislead the magistrate who issued the warrant with regard to confirmatory search." (R.T., 2, 282, 3-8; 285, 11-15.)

**FN 11**

In the challenged affidavit, the affiant alleges that upon smelling, ether, which he claims to have smelled immediately upon exiting his vehicle on the highway above the subject residence, that he was "aware of the extreme volatile nature of ether and the danger to persons in or around ether". The affiant further alleged that in order to "remove any doubt as to where the odor was coming from and to insure the safety of anyone in or around the residence," he walked down the brown-colored wood stairs to the front door of the residence, and subsequently to the rear of the residence whereupon he made certain observations, which included the detection of "a very strong odor of ether". The affiant then alleged that he and the detective accompanying him returned to the sheriff's vehicle and contacted a sheriff's patrol unit "to remain at the scene of the residence to secure it and prevent anyone from entering the residence." The affiant further alleged that among other officers contacted, he contacted "fire department officials to assist in the

investigation."

Yet, upon giving testimony during preliminary examination, the affiant testified that it took approximately five to six hours to obtain the subject Search Warrant, (Reporter's Transcript. June. 1982, p. 120, 1-18) (hereinafter R.T., June), and that other than calling for a patrol unit to secure the scene, the affiant did not request any fire units or alert the forest service to come into the area. (R.T., June, 120, 12-18.)

In addition to the above, the affiant, during testimony at the preliminary examination, testified that he did not believe that there would in fact be an explosion, and if there was going to be an explosion, it would already have occurred. Futhermore, the affiant testified that rather than entering the residence to make a determination whether there was some pilot light, etc., which might ignite the alleged ether, the affiant felt that it was a situation which did not require contact with fire officials, and that his not entering the residence was related to his intention to acquire a Search Warrant. (R.T., June, 121-122 and 123, 1-3.)

From the above, this defendant contends that the Court can determine that the allegation of contact with fire officials contained within the Affidavit in Support of the Warrant is clearly a misstatement. The defendant contends that said misstatement is intentional, and was inserted for the purpose of deceiving the magistrate into believing that the affiant was concerned with the fire hazard, therefore bolstering facts in support of probable cause for issuance of the warrant. If in fact the affiant did not contact fire officials until after the warrant was issued, which is further supported by the affiant's Police Report dated August 12, 1981, a copy of which is attached hereto and marked Exhibit "A", and by this reference incorporated herein, why then would the affiant make such a statement in the affidavit? Clearly, one of the primary concerns of the affiant throughout his affidavit is that of the hazard of fire and/or an explosion.

FN 12

Open ether, or at least its smell, was found on a pan on the porch (Tr. pp. 123-124, this case). The smell may also have been coming (evaporating) from the two buckets of mixture found in the house (same reference).

FN 15

THE COURT: I'm willing to hear argument. I'm inclined to agree. This witness is obviously the expert with regard to the chemical makeup and chemistry aspects of the testimony.

MR. SMITH: Well, particularly with reference to the court's acknowledgment of the Doctor as an expert, . . .

(MR. SMITH) . . .

Q. And did you read this article with an eye toward what law enforcement was looking for to assist you in providing competent testimony?

A. Yes, yes.

Q. Did you note that one of the things that appears to be stressed rather frequently in articles of this nature is to look for an odor of ether?

A. That's one of things that's there. It says ether and other solvents.

Q. And other solvents?

A. Ether tends to be isolated on — as the thing, as the key, but other solvents obviously would be present, other odors.

Q. During your various experiences in testifying in court as an expert, has that been a common experience or a common factor focused upon as being evidence of some illicit activity?

A. That's one of the first things that's usually talked about, that the smell of ether is noted, and that's a reason for going further in an investigation.

Q. Well, considering your prior testimony and, of course, your prior experience, do you have problems accepting that as being a viable reason for thinking that there might be something illegal taking place?

A. In my opinion, yes.

Q. And —

FN 16

A. There are plenty of legal uses of ether.

Q. Would it be fair to state that there are a lot more legal uses for ether than illegal?

A. Obviously, yes.

Q. I think you testified earlier there are at least 100, maybe even thousands, of common uses for ether that do not involve an illegal activity?

A. Probably too numerous to enumerate the number of uses, but generally they have to do with being a solvent and being a good thing to dissolve organic compounds in.

FN 17

Q. That's the way I read it, also.

If you approached such a residence and smelled ether, would that indicate to you that some specific thing is being synthesized?

A. Not really. It would be common in any laboratory to find ether. It's one of the — I don't think I would ever go into a laboratory and not find ether of any kind. The people working with organic compounds; you're going to use ether. It's one of the four or five common solvents that I mentioned before.

FN 18

A. Actually, you can buy ether in cans in something like Gemco for spraying into a diesel engine, usually. I have a diesel car, and I've used that a few times on cold mornings.

Q. That's not usually the type of bottle that you buy it in?

A. Not the normal kind of package, no, but for contractors, they use ether in cans. Sometimes they buy the same kind of cans we buy in the laboratory.

Q. Is that the same ether that you use in the laboratory?

A. Sure, it's the same ether.

Q. So it would essentially start the same?

A. Start the same. Usually starts an engine in the mornings, diesel engines of all kinds.

Q. Don't some people use the ether to mix with gasoline, add to gasoline, to increase its combustive ability?

A. Yes, ether is sometimes used to make gasoline — again, to start an engine on a cold morning you add ether to the gasoline. sometimes.

Q. Ether is also used in woodworking, isn't it, to assist dyes in penetrating the wood?

A. Yes, it's common solvent for dyes and it can be used to help penetrate whatever they're dying.

Q. If I were to get something electroplated, might I use ether in that, also?

A. You could use ether in electroplating, yes, to dissolve the stuff that you're putting on.

Q. How about if I wanted to make soap?

A. Soap is a general term for things, including detergents, and many detergents are made with ether and if you were mixing different kinds of detergents to make a particular kind of soap or deter-

gent, then you might use ether, sure.

Q. If per chance I wanted to compete with Tide and some of the others, it wouldn't be uncommon to hear of some guy hiding himself away to work on his formula?

A. No, that's very common.

Q. And most of the items listed in the return for the search warrant are items that you could readily acquire?

A. Yes.

Q. In fact, did you note anything there that you couldn't easily acquire?

A. I didn't see anything that seemed so unusual, no.

Q. And, again, it's your opinion or your testimony that based upon the reading of the affidavit in support of the search warrant, you could not personally have made a determination of what was being manufactured?

A. Not based on what I read, no.

Q. You said something about polymers. What is a polymer?

A. All plastics are polymers. Plastics — and nowadays many things are plastic.

Q. Would ether be used in synthesizing some plastics or polymers?

A. Sure, ether is. Again, they are organic compounds. It's a good organic solvent, and you might find it used there.

The people who put together surfboards use ether in solvents. They use polymers as the core of the surfboards. They would use ether to dissolve those organic compounds.

Q. So it would not be uncommon to smell ether coming out of a surfboard manufacturing shop?

A. Ether, acetone, methylacetate; all three of those.

Q. Ethyl ether has a distinct odor unto itself or that if you put five different ethers on the table, would — could it be very easy to detect which one is ethylene?

A. It would be for me. I doubt if it would be for the normal lay person.

Q. Most of your students are beginners in chemistry; is that correct?

A. Yes.

Q. Have you experienced that they frequently mistake one odor for a particular chemical, or are unable to discern chemicals by their smell?

A. Not with a reasonable degree of time to it. When they get used to it, they pick it up within a few months, sure, smelling. Some people are better than others, obviously, smelling things and identifying them.

Q. Again, would it be your testimony that there are many, many, more times the use of ether for legal purposes than illegal purposes?

A. Yes.

Q. And in your own personal experience, it has not been uncommon to know associates or colleagues who set up labs for their own personal experiments?

A. It's not uncommon.

FN 19

Q. Do any of those three smell similar?

A. It's hard to say. To me they don't, but I think to someone who's not a chemist they might smell similar.

Q. I think you've answered that way prior. When you say, "To me they don't," you apparently have developed some sophistication in determining by sense of smell what certain chemicals are.

A. When you work with things for a long period of time, I think you gain a familiarity with it; and with solvents I can tell by smelling what many of them are, the common ones.

Q. Would it be fair to state that absent that kind of familiarity and experience and long periods of time of being around various chemicals and becoming familiar with them, that it would not be easy for you to determine the difference between —

A. I would guess it would be difficult for the normal lay person to smell the differences between different kinds of solvents, yeah. They would just smell — people usually say it just smells like a chemical.

If you go into a hospital, for instance, people always talk about the ether smell in a hospital. But the major smell is not ether; it's ethyl alcohol.

FN 20

(DR. SIMS:) . . .

A. Nothing particular to methamphetamine. I don't think. I mean, it could be anything. You don't know what's going into — if you walk into a lab, you probably smell a lot of things.

Q. There's nothing specific about methamphetamine that would give that processing at this stage a distinct odor from any other processing?

A. Not unless you absolutely knew what was going on; I don't think

you could tell. somebody could be making it in my laboratory and I wouldn't know for sure that's what they were doing unless I knew that;

FN 21

(MR. SMITH) . . .

Q. Does the vapor of ether travel over great distances?

A. It will run downhill, yeah. It's essentially like water. It's heavier than air and it tends to run around. It tends to fall to the bottom of a room.

Q. So if we were in a three story building, the smell would probably go down to the first floor, eventually?

FN 22

A. Depending on how the building is sealed, yeah.

Q. If you — well, again, making reference to the affidavit in support of the search warrant, the affiant, of course, noted that he was concerned about the volatile nature of ether because of the detection of a strong odor immediately upon exiting his vehicle upon the highway.

Were you to be in a similar situation and smelling ether at this point, would you — would it be realistic to be concerned that this might be a fire hazard?

A. That's hard to say. If it were outside, I wouldn't worry about it too much. We can smell ether around the university a lot because it gets blown on the — in the wind and sometimes it drifts over and drops down in a courtyard outside the buildings; but it's not dangerous in that situation, but more dangerous in a closed area.

FN 23

Q. BY MR. SMITH: Exhibit 1, and I think you can determine — it has been stipulated — this is the residence in question.

Starting with photograph number 2, highway which apparently is where the affiant first smelled ether, a strong odor of ether, would that be likely that it would rise to the highway?

A. Normally, I wouldn't expect it to. The only — well, normally I wouldn't expect it to if it's on the side of a hill like that. I would expect it to go downhill and people underneath it would be smelling it more than people on top of it.

FN 24

Q. What might make it rise, if it did?
A. It will rise a little bit on its own simply on the nature of its volatility and the ability to spread, but what happened — if there was a wind blowing or something, you might be able to smell it on top. It would have to be some kind of local condition like that.

FN 25

Q. Well, is the smell of ether the residue of the chemical, the liquid, as it is changing process and evaporating into the atmosphere?
A. It changes from the ether, a liquid, to ether, a vapor, like water changes from water, a liquid, to steam, which is — you can't see steam always. You see steam. when it starts to coalesce, but steam is invisible, also. It's —the molecules are just further spread apart and not condensed into a liquid.
Q. As a general rule, when ether is in its vapor state, how long does it stay in the atmosphere in the out-of-doors?
A. You can detect it, but not very far away and outside — I've had ether outside a number of times and it's hard to detect it more than 50 — 50 feet away from where the source of the ether is.

FN 29

BY MR. DOLE:
Q. Yes. You read the return to the search warrant?
A. Yes.
Q. This is on the cabin, the search warrant?
A. Yes.
Q. What in that return to the search warrant could have caused an odor of ether?
A. I didn't see anything, personally. I was curious as to the warrants; what they actually were looking for. What the listing was, was exactly correct and I didn't see any of that found, so I was curious. There was no ether there.

(MR. McCORMICK:) . . .
Q. Detective Rucker, do you recall if there was any ether found in the cabin?
A. Not specifically, no, sir, I don't.
Q. Would it refresh your memory if you could refer to your report?
A. Possibly. (Complies.) Apparently not.

FN 31

Q. And the untrained nose, the non-chemist or -scientist — and having been an untrained nose at one point in time, is it pretty easy to confuse various chemical smells?
A. Yes, in the beginning when I — I was starting in chemistry, it was easy to confuse those smells, sure.
Q. Well, the judge made a point a while ago about having indicated he thought he smelled ether. I mean, from your clothing?

FN 34

THE WITNESS: Kathy Franklin, K A T H Y , F R A N K L I N.
THE CLERK: Thank you.

DIRECT EXAMINATION

BY MR. MORRISSEY:
Q. Miss Franklin, in the summer of 1981, were you working for the California Division of Forestry?
A. I was.
I'm a seasonal fire fighter for the California Department of Forestry.
Q. And stationed in the Crestline area during that summer?
A. Yes, that's correct.
Q. And on or about the 3rd of August, did you go to a location at 24601 Lake Gregory Drive?

FN 35

A. Yes. We responded to a possible fire and explosion. The road runs east and west. And there is a — like a stairwell that goes down towards the house. So it's quite a — sits quite low in comparison to the road.
Q. Now, when you got there, were you on a fire truck?
A. Yeah. We had responded in engine 25.
Q. And upon your arrival, where did you go?
A. Upon arrival, Engineer Kelly advised us to put on our bunkers, or our turnouts, and stand by. And he proceeded to go down towards the house to see what the officers wanted us to do.
Q. So did you stay up on the road, then, during the time you were there?
A. Yes, I did.

Q. And what if anything did you smell?

A. When we got there and we were standing by the truck, I noticed a chemical smell, something out of the ordinary in the air. It wasn't overpowering, but it was strong enough that I could smell it.

It seemed familiar, but at the time, I wasn't positive of what I was smelling. It was just a chemical odor.

Q. Did you finally that day come to a decision as to what it was you were smelling?

FN 36

A. A few minutes later —

Q. All right. What caused you to recognize it?

A. Engineer Kelly came up from the home and advised us that we could remove our jackets, that we would stand by for a few more minutes. The sheriff was going to release us; that they had found some sort of lab, and probable ether. And then I recognized the smell.

FN 37

Q. When were you first contacted by the Sheriff's Office?

A. My last day was February 28th, but I was released February 23rd of '83, because I was going to attend a Firefighting 1 academy.

So I was in the office between the 23rd and the 25th. I'm not sure on which day. And it was in the early morning, before 11 o'clock. And it was early because I was getting my gear. And they contacted headquarters, and I just happened to be there.

Q. When you say "they" — was there more than one —

A. The sheriff. He contacted me.

FN 38

Q. Did Mr. Morrissey tell you why he was asking you to testify?

A. Just corroborating evidence, I suppose.

FN 42

A. It was — I can't — I'm not — I can't say that it was ether that I smelled, because I didn't see what was in the house.

FN 43

Q. And you say your prior experience with ether was a very, very brief experience the year prior, wasn't it?
A. Very limited.
Q. And to this date, you don't know whether you smelled ether, do you?
A. I couldn't say for sure, because I didn't see anything to back up my familiarity. It could have been something that smelled like ether that maybe I'd never smelled before.
Q. Yeah. And you're really not sure how many things smell like ether?
A. No, sir.
Q. And what you call your familiarity is really more probably properly termed your vagueness, isn't it?
A. My brief exposure could be considered vagueness.

FN 45

Q. And in fact you were the one that came to that conclusion, because you thought maybe it was a PCP lab?
A. Right.

FN 46

Q. And you thought they used ether on a PCP lab.
A. Just the — just for drugs and things like that, because that was our limited — most people in our class, when we smelled ether, that's what our first thought was. But we didn't discuss ether in long terms.
Q. So your teacher, or instructor, suggested to you that if you smell ether, there's drugs somewhere nearby, basically?
A. Uh-huh.

FN 47

Q. Did your instructor tell you that ether is probably the most commonly used solvent in organic chemistry?
A. No, sir.
Q. Did he suggest to you that there are at least 200 lawful uses of ether?
A. No, sir.
Q. Did he suggest to you that it's more likely than not if you smell

ether, its for some lawful purpose?

A. No, sir.

FN 48

A. I'm not an expert, no, sir.

Q. Would your answer be that no, you really don't know what you smelled?

A. I couldn't be positive. I just thought it was ether. I smelled it, and it — I thought it was. But I couldn't make a -- you know, a — I couldn't say as an expert it was ether.

FN 49

Q. (BY MR. SMITH) I guess what I'm asking, ma'am is — and I don't want to put words in your mouth. Can you say today in this court that you know without a doubt that what you smelled that day was ether?

A. I couldn't say that.

Q. You're really not sure, true?

A. It was, like I said, the smell, and everything else that was added to, I made the conclusion that I smelled ether, a combination of my smell — familiarity with it before, smelling it before, and smelling the chemical that was familiar. And then Engineer Kelly's statement.

Q. Would your answer be that no, you really don't know what you smelled?

A. I couldn't be positive. I just thought it was ether. I smelled it, and it — I thought it was. But I couldn't make a — you know, a — I couldn't say as an expert it was ether.

FN 50

Q. If that front door hadn't been open, would you still have presumed that the smell you were smelling was coming from that cabin?

A. No, sir, wouldn't have.

Q. Because you would wonder where it was coming from, right?

A. Yes, sir.

FN 51

BY MR. MORRISSEY:

Q. You're a San Bernardino County sheriff's officer attached to the identification bureau?

A. Yes, I am.

FN 52

MR. SMITH:

Q. Standing directly across the street from the residence — showing you, well, your aerial photograph again, No. 10. Let's say we're standing immediately in front, say the stairwell, and were we to walk directly across the street. Can you see the house from there, across the street?

A. If you're standing on the opposite berm area, the only portion you could see would be the stairwell.

Q. You can't see down the stairwell?

A. Not from across the street.

Q. You can't see the front door of the house?

A. Not from across the street, no, sir. Not from ground level.

Q. Okay. As to the portion of the residence, is that the front door that's — appears to have a screen on it there?

A. Yes, sir, it does.

Q. Okay. Can you see that from across the street?

A. Across the street? No, sir.

Q. But you already told us you can't see anything in front of the house from the street; is that correct?

A. Correct.

Q. So the same would be true with No. 22?

A. That's correct.

Q. And this No. 18, where we have what has come to be known the top of the stairwell, and it has the Marviches' name and street address on it — was that taken from across the street?

A. Yes, sir, it was.

Q. And so that particular photograph really shows what a person can see across the street?

A. Standing at ground level, yes.

Q. Standing at ground level.

As such, then, across the street, you can't see the cabin, can you?

A. From ground level? No, sir.

Q. And definitely couldn't see whether the front door was opened or closed, could you?

A. No, sir.

FN 53

Q. Would it be fair to state in your estimation, that because of the structure of the home below the highway as well as the numerous trees that are around there, that it's a fairly private kind of place?
A. For vision, yes, sir.
Q. It wouldn't be easy to view in unless you were close up, would it?
A. Yes, sir, it is.
Q. So visually, it would be very hard to see in, wouldn't it?
A. Yes, sir.
Q. And it's also pretty secluded there, too, isn't it? For that purpose? For someone on the ground to be looking in?
A. Yes, sir.
Q. So from a distance, it would be hard to see in there, wouldn't it? In fact, the photograph — you can't see anything in there, can you?
A. Not really, no, sir.
Q. Kind of like somebody designed it for privacy?
A. Yes, sir.

FN 54

Q. And that decking has a — not only a railing, but the railing is covered with something, isn't it?
A. This railing (indicating)?
Q. Yes.
A. Yes, sir, it is.
Q. It's wood with small holes in it, isn't it? Kind of diamond-shaped holes?
A. Yes, sir.
Q. So from a distance, it would be hard to see in there, wouldn't it? In fact, the photograph — you can't see anything in there, can you?
A. Not really, no, sir.
Q. Kind of like somebody designed it for privacy?
A. Yes, sir.
Q. And the decking around the residence has that kind of trimming around it all the way that there is decking, doesn't it?
A. Yes, sir.

FN 55

BAILIFF: Here they are.

MR. SMITH: May I begin, your Honor?

THE COURT: Wait a minute.

All right. On the record, on the Morton, Quesada matter, record will reflect defendants are present with counsel.

This is a continuation of the motions that we previously heard. We were taking testimony from witnesses. We had heard from the witness Sims. Matter was then continued.

I understand there is another witness for today. And then counsel wish to — well, one or two witnesses. And then some argument.

I understand, Mr. Smith, you have an objection to the further testimony or introduction of evidence in certain areas?

MR. SMITH: Well, I have an objection to certain evidence being introduced at this time for the Court's perusal, and I also have an objection to Mr. Wyatt testifying to it.

Apparently, Mr. Morrissey wants to introduce photographs of the interior of the Crestline cabin on the day that Detective Rucker, who was the affiant in the search warrant, made his view from the exterior through allegedly a large sliding glass window.

My objection is based upon two grounds. One of them is we have challenged his right to be there to see that. That's No.1. So introducing anything in evidence right now is really irrelevant, at least as to that issue.

Secondly, as Mr. Morrissey told you in chambers, he kind of wanted you to have an idea what the place looked like.

Well, we're challenging what was seen, taken, et cetera. There's been a discussion of it in the affidavit, and obviously, we can't tell the Court that it cannot read the affidavit.

We're suggesting, however, that the court is precluded from taking outside materials to bolster the affidavit. Say, "Oh, now I see what he was talking about."

The affidavit itself does not say, I saw A, B, C, D, and E, and based upon my expertise, A and B is used for this, and C and D combined will work for this, and therefore I believe there is a clandestine laboratory.

That's not there, and that's what we're arguing. He's saying, "well, Judge, you look at that and you'll see what he saw and what he meant." But there's nothing in evidence that said that meant anything.

In fact, we had an expert, and he read the affidavit; he kept it solely to the affidavit. He testified that based upon his knowledge as a chemist for the past 20-some years and having read the descriptions in the affidavit in support of the search warrant, he saw nothing there that would indicate that there was any unlawful activity taking place.

In fact, he said he saw — and we have a transcript of that — he saw nothing that would indicate to any degree what if anything was being

processed, or synthesized in the cabin. We also have testimony from Detective Rucker with respect to those issues, where he indicated that at the time he made his observations . . .

THE COURT: Yeah, go ahead. Go ahead.

MR. SMITH: — indicated that at the time he made his observations, "he thought something was being processed." But that "he didn't know what stage it was in."

He came to a conclusion that it was either a PCP lab or that it was a lab for manufacturing methamphetamine, with the term clandestine, and also the term manufacturing, which is also inappropriate.

Regardless, I say, what purpose, other than to taint the Court's mind as to what was in the cabin, which is challenged at this point. It's not evidence. It's something that the prosecution seeks to submit as evidence to the Court, over objection on each and every item, if we so choose, as to its relevancy to anything.

But right now we're looking at why did Judge Press issue the search warrant? What was in the affidavit that showed Judge Press that there was a possibility that a crime was taking place and that the items sought to be seized would be located on the property to be searched, with some specificity, mind you.

And we're saying there wasn't anything. And Mr. Morrissey is saying, well, wait a minute, your Honor. You could look at these pictures and say that probably there is something there. Why don't you see what this place looked like.

Very inappropriate. Very inappropriate for the Court to be asked to, or to accept the role of reviewing the challenged, or proffered evidence prior to determination that it was rightfully seized. It's really inappropriate.

And I think that — I'm not suggesting it's a bad faith tactic. I'm suggesting we all look at the cases and we look at the purpose of the Fourth Amendment. It's not here just for someone who might later be determined innocent. You don't make that determination first. You make the determination first whether it's been violated upon challenge. Then you can later look to see if someone has some evidence to submit.

This approach puts it to, "well, your Honor, let's look at whether the defendants are guilty first, and then let's decide whether we can go ahead with the warrant," whether it was a good warrant.

That's not what America is about and not what the Fourth Amendment is about, and it's not a technicality. It's a very important provision. And it's not just related to this case. So I would suggest it's just totally inappropriate. I strenuously object.

And I think that also, unless Mr. Morrissey can show the Court that there's some good reason, these photographs are somehow relevant and

and Mr. Wyatt (sic) testifying, yes, I took these from the inside of the residence and so forth, that it somehow has something to do with the issues we challenged, because we're the moving party. I can't see why the Court would even consider it.

THE COURT: Of course, in the motions, where we are in effect challenging the search warrant and the activity of the police with regard to law enforcement, with regard to the obtaining of the warrant in the first place, we're dealing in two areas. One is the motion to quash, and the other is a motion to traverse the warrant.

And as I understand it, from a review of the affidavit in support of the warrant, where there is discussion in the affidavit with regard to observations made by the affiant, both inside and outside of — from where his location was and what he could see.

If there were photographs which, although taken inside, might illustrate some of the things that were put in the affidavit, I don't know if they're — if photographs of those matters would be appropriate or not. I think I would have to look at them and see, and you'll have to have a continuing objection. They may be relevant, they may [illegible].

But in an overall determination in motions, counsel [illegible] suggested to the Court, both informally in chambers and I guess now here in the record, that somehow the Court should not entertain even a view of these pictures when they are offered by the prosecution in support of the prosecution's position going to the validity of the warrant.

I have to take the representations of counsel at face value, that the evidence to be submitted does have some relevance to these issues. So all I can do is note your concerns for the record, Mr. Smith.

MR. SMITH: I have a couple more concerns if I may, your Honor.

THE COURT: All right.

MR. SMITH: First of all, I haven't seen any representation, at least for the record, that there is any relevancy.

But secondly, your Honor is stuck with the warrant as it sits. We Can't supplement the warrant and say, gee, all these things exist, when the issuing magistrate reviews it. Absent taking testimony, which is provided for in the Code, which was not done here, he's stuck with the affidavit in support of the search warrant. That is the determination as to whether there's probable cause.

We're saying —

THE COURT: You're saying those representations in the affidavit are lies and they are false.

MR. SMITH: I have never said anything was a lie; that's No. 1. I said that many are intentional misrepresentations.

THE COURT: Intentional misrepresentations?

MR. SMITH: Yes. And if they're not — none of it had to do with

the interior of the residence. I have never suggested that there was a misrepresentation as to what he saw inside.

THE COURT: I have difficulty determining how an intentional misrepresentation in a sworn affidavit under penalty of perjury can be anything but a lie.

MR. SMITH: I didn't call it a lie. I called it a misrepresentation, because that's a term of art used by the cases.

However, we never said there was any misrepresentation as to what Detective Rucker saw within the residence. So why put in the photographs? We never challenged that. We challenged statements he made with respect to the smell of ether, with respect to calling the fire department immediately upon his discoveries or his perceptions of the interior. We never challenged what he saw inside.

THE COURT: You're challenging his credibility.

MR. SMITH: So? Showing those pictures is not going to show that he smelled ether, is not going to show that he called the fire department.

I say he has to be confined to those issues we're challenging, to those facts, those statement that are alleged misstatements.

If Mr. Morrissey can offer some proof to the Court that they will show that Detective Rucker called the fire department, for example, or that there was definite concern about a fire hazard, which Detective Rucker testified later he wasn't worried about, or somehow they will show that Detective Rucker smelled ether — I'd love to know how — then maybe they are relevant. Otherwise, it's just showing your Honor what the house looked like inside, and it has no relevance to anything that we've challenged.

THE COURT: Okay. The objection is noted, and I take it will be an ongoing and continuing objection to either testimony regarding the taking of the photographs or what the photographs, if they are offered, purport to show.

MR. SMITH: And an added ongoing objection that Mr. Morrissey so far has offered nothing to the Court, and the Court has already made a decision. I don't understand that.

THE COURT: I'm saying I will consider evidence that is offered to me if it is relevant and if it is admissible. I can't probably tell that until I've heard either the witness testify about it or seen the exhibits that they want to offer.

MR. SMITH: Well, am I correct, then, in understanding the Court that the Court is saying, Mr. Morrissey has told me that he thinks it's relevant and that's enough?

THE COURT: No, no. I think counsel misunderstands what I'm saying. If either side in this case offers evidence to the Court on the basis that they are offering relevant evidence that goes to the issue or issues in

the case, I think I have to consider whether in fact that evidence is relevant or not.

I don't know if it's relevant or not. I haven't seen it, and I don't know how it ties in.

And mention has been made of some photographs. I don't know whether they're relevant. They may be totally irrelevant.

MR. SMITH: Perhaps I haven't stated my objection clear enough.

I would object on the grounds that it's irrelevant and it doesn't tend to prove a fact in issue. And perhaps he could tell the Court how it could.

THE COURT: I'm not going to tell counsel how to proceed with his case. If he wants to call a witness, and you object to the testimony of the witness as the questions are asked. We can argue this thing all day long.

MR. SMITH: I know. I think it's an important point, your Honor.

THE COURT: Mr. Morrissey.

MR. MORRISSEY: Yes, your Honor. I am assuming that if the Court for some reason should decide that these are not admissible evidence, these pictures, and that the Court is not, by virtue of the fact of having seen, going to be influenced in its decision, No. 1. And if I'm wrong on that, I won't offer the pictures.

But No. 2, these motions to suppress are de novo hearings, and we're proceeding in this case on the basis of the preliminary hearing transcipts, plus any other evidence either side wants to present.

Now, these pictures — I've been reviewing them while counsel had been addressing the Court — are all marked from the preliminary hearing, transcripts, they're all in — marked as being in evidence. And reference was made to some or all of them at the preliminary hearing.

And part of the challenge here is to probable cause. That is, that what the officer saw did not give him cause. Well — for the search warrant.

I think it's important for anybody who has to make that decision to see what the officer saw. And it's for that reason that I'm offering these pictures, pictures of the interior of the house.

Now, I have some pictures also of the exterior of the house which have been taken by Chuck Wyatt from the Sheriff's Office at various times since the service of the search warrant. Some of them are aerial photographs which display the number of houses around the area, for example. And that's appropriate in this case because it's alleged that this house was somehow in a very remote area, and that a high degree of privacy is therefore to be accorded the occupants.

MR. SMITH: I think that's a misstatement of our argument, your Honor, and I would object to that. We have not suggested that it was necessarily in a remote area.

THE COURT: Let's let him finish his argument — or presentation.

MR. MORRISSEY: So I have pictures of the outside of the house,

ground pictures, and also some aerial photographs to submit to the Court, after having them marked and explained by the man who took them.

MR. SMITH: Your Honor, may I respond again?

THE COURT: Sure.

MR. SMITH: What Mr. Morrissey represented to the Court with respect to the photographs of the interior of the residence is exactly what I suggested. Your Honor thought that perhaps he was going to offer those to prove up some of the facts alleged that we call misstatements.

He told the Court, no, I think that you just ought to be able to see this so you'll know what the detective saw.

There is no challenge before this Court by way of our motion as to what the detective saw. We have suggested only that what he saw was not explained clearly enough in the affidavit to constitute probable cause. That's what we've challenged.

How can the photographs, then, clarify that for your Honor? When the issuing magistrate was stuck with the affidavit. He didn't have the photographs. He only had the affidavit with a description of what the detective saw, which we state is an insufficient conclusionary language that says, because of this, we have this, with no analysis, no reasoning.

In fact, the final sentence is, I've discussed this with officer so-and-so and so-and-so as for my reasons believing there is.

He didn't say what he discussed with them; he didn't detail why he believed that. That's what we challenged. We didn't challenge what he saw.

They're irrelevant. They can serve no other purpose other than to let the Court take a look at what happened and what's inside, and that's not described in the affidavit, and he's trying to offer evidence that wasn't in the affidavit. He's not trying to show there was a smell of ether anywhere. It's irrelevant. What does it tend to prove?

MR. MORRISSEY: Two of these pictures, for example, show the items on the decking, which smelled of ether.

MR. SMITH: Whoa, we —

MR.MORRISSEY: There are a couple more of them that show the buckets of apparent methamphetamine in the process of being manufactured.

MR. SMITH: See, there we go again.

MR. MORRISSEY: As I say, there are some general views of the inside that you can see from the outside.

THE COURT: Well, I think we might best consider these as we have some foundational testimony so that we can make a determination.

FN 57

MR. SMITH:

The affiant viewed the residence, according to his statements under the penalty of perjury and his affidavit in support of the search warrant, from the exterior of the residence.

It's fairly clear to me that at least 90 percent of these photographs are taken from the inside, not from the outside through a window. And I would object to them being shown to the witness and any kind of testimony about them, again, for the same reason: He's trying to prejudice the Court's mind.

THE COURT: Objection is noted. Overruled.

A. Yes, sir, they are.

THE COURT: Just for curiosity purposes, Mr. Morrissey, how many photos do you have there?

MR. MORRISSEY: I have about ten more, your Honor.

THE COURT: Are they all necessary to illustrate your point?

MR. SMITH: What point is that, your Honor?

THE COURT: I'm not sure, yet.

MR. MORRISSEY: Maybe not absolutely, your Honor.

THE COURT: Okay. I recognize that we are concerned with what may or may not have been able to have been seen at that point, but it would seem a selective use of photographs might be better.

MR. SMITH: That hasn't been an issue, your Honor, That's the whole point. I haven't objected to what officers saw.

THE COURT: I understand your position. You said it a hundred times. I understand, you're not contesting what the photographs show or what was there. But I've explained my reasons for wanting to have this type of evidence at least presented for consideration.

FN 62

THE COURT: Well, I think that the implied findings would go along with the ruling of the Court, to the extent that the Court has explained to you, and the Court would repectfully decline to further engage in a fact finding piecemeal process.

MR. SMITH: Well, I certainly respect the Court's decision there. May I ask you another question, your Honor?

THE COURT: Well, Mr. Smith, I — no, I don't think so. I've given a ruling, and you know, it — it's I think about the best I can do under the circumstances. And I do not want to go through on a piece-by-piece indication of what evidence I believe or what evidence I don't believe or what fact I find to be true or not to be true.

No. 1, I do not believe it's required. No. 2, the implied findings will support the general ruling. And I think that that is about as much as you're entitled to at this point.

FN 65

Q. If you — well, again, making reference to the affidavit in support of the search warrant, the affiant, of course, noted that he was concerned about the volatile nature of ether because of the detection of a strong odor immediately upon exiting his vehicle upon the highway.

Were you to be in similar situation and smelling ether at this point, would you — would it be realistic to be concerned that this might be a fire hazard?

A. That's hard to say. If it were outside, I wouldn't worry about it too much. We can smell ether around the university a lot because it gets blown on the — in the wind and sometimes it drifts over and drops down in a courtyard outside the buildings; but it's not dangerous in that situation, but more dangerous in a closed area.

Q. With respect to the volatility of ether, again, I think your testimony was, earlier, that were you to detect the odor of ether in the out-of-doors you would not be alarmed with respect to fire hazards?

A. No.

Q. Why is that?

A. It takes a closed area to make an explosion, for a fire to do anything. When it's outside, you're not going to have the concentration, usually, to do anything. In fact, you could probably take a beaker of ether outside and have it catch fire; we did that same kind of thing. Inside, you might get an explosion.

A. Yes.

Q. So if — well, gasoline stations as a general rule are open-aired and I presume that's probably for safety purposes?

A. I would guess that's part of it, sure.

Q. That's why we have vents in the lab and —

A. That's why you have fumers in the lab, to turn over the air as fast as we can.

Q. And you're not at all worried that it's blowing outside because there's no fire hazard there?

A. Not outside.

FN 69

Once any of the above grounds are established by the defendant, the burden is then upon the prosecution to show that there was either a privilege or a reasonable omission. (28 Cal. 3d at 390.)

II

THE AFFIDAVIT IN SUPPORT OF THE ISSUANCE OF THE CRESTLINE WARRANT CONTAINED SEVERAL FACTUAL INACCURACIES.

Recognizing his burden to relate, with some specificity, his reasons for contending that the affidavit is inaccurate, Defendant MORTON offers the following in support of said allegations:

In the challenged affidavit, the affiant alleges that upon smelling, ether, which he claims to have smelled immediately upon exiting his vehicle on the highway above the subject residence, that he was "aware of the extreme volatile nature of ether and the danger to persons in or around ether". The affiant further alleged that in order to "remove any doubt as to where the odor was coming from and to insure the safety of anyone in or around the residence," he walked down the brown-colored wood stairs to the front door of the residence, and subsequently to the rear of the residence whereupon he made certain observations, which included the detection of "a very strong odor of ether". The affiant then alleged that he and the detective accompanying him returned to the sheriff's vehicle and contacted a sheriff's patrol unit "to remain at the scene of the residence to secure it and prevent anyone from entering the residence." The affiant further alleged that among other officers contacted, he contacted "fire department officials to assist in the investigation."

Yet, upon giving testimony during preliminary examination, the affiant testified that it took approximately five to six hours to obtain the subject Search Warrant, (Reporter's Transcript, June, 1982, p. 120, 1-18) (hereinafter R.T., June), and that other than calling for a patrol unit to secure the scene, the affiant did not request any fire units or alert the forest service to come into the area. (R.T., June, 120, 12-18.)

In addition to the above, the affiant, during testimony at the preliminary examination, testified that he did not believe that there would in fact be an explosion, and if there was going to be an explosion, it would already have occurred. Furthermore, the affiant testified that rather than entering the residence to make a determination whether there was some pilot light, etc., which might ignite the alleged ether, the affiant felt that it was a situation which did not require contact with fire officials, and that

his not entering the residence was related to his intention to acquire a Search Warrant. (R.T., June, 121-122 and 123, 1-3.)

From the above, this defendant contends that the Court can determine that the allegation of contact with fire officials contained within the affidavit in support of the Warrant is clearly a misstatement. The defendant contends that said misstatement is intentional, and was inserted for the purpose of deceiving the magistrate into believing that the affiant was concerned with the fire hazard, therefore bolstering facts in support of probable cause for issuance of the warrant. If in fact the affiant did not contact fire officials until after the warrant was issued, which is further supported by the affiant's Police Report dated August 12, 1981, a copy of which is attached hereto and marked Exhibit "A", and by this reference incorporated herein, why then would the affiant make such a statement in the affidavit? Clearly, one of the primary concerns of the affiant throughout his affidavit is that of the hazard of fire and/or an explosion.

In addition, the defendant alleges that failure on the part of the affiant who informed the magistrate that he was not concerned with an explosion, and that in fact the affiant believed that if there were to have been a fire or explosion it would already have occurred, and when coupled with the fact that the affiant had every intention of acquiring a Search Warrant, and did not enter the subject residence for the purpose of determining whether there was some exisiting pilot light, etc. which could cause the alleged ether to ignite, defendant alleges we then have an omission of a material fact. Certainly, the absence of a real fire hazard is a fact about which the Court should have been informed. Again, if the Court is basing its determination to issue a warrant, at least in part, upon the affiant's allegations of the extreme volatile nature of ether, and the potential fire hazard attendant thereto, it would seem necessarily appropriate to inform the Court that the affiant did not believe that a fire and/or explosion was likely to occur.

On Page 1 of the Affidavit in Support of the Search Warrant issued for search of the Crestline residence, the affiant alleged that he had received information from a Deputy Rick Roper, assigned to the Twin Peaks Substation of the San Bernardino County Sheriff's Office, that he had received information from a citizen informant (the owner of the subject residence), involving a possible clandestine laboratory operation at the subject residence. A review of the affiant's incident report dated August 12, 1981, and attached hereto as Exhibit "A", indicates that the informant clearly had no belief that there was a clandestine laboratory operation, but on the contrary, believed that the renters at the subject premises may be manufacturing some type of plastic material.

In addition, the affiant alleged that he personally contacted the owner

of the subject premises who informed him of his observations upon arriving at the premises and that he initially stopped at the subject residence only to inform the tenants to turn off the outside lights which were burning during the daytime, based upon the ground that the owner paid the utility bills. The owner then related to the affiant that he was "very upset about the condition of the interior of the residence and left, with his intentions to call the realtor that rented the residence for him and to tell him to evict the tenants". It was only after the owner relayed his discovery to his son and daughter-in-law that he received advice to contact the sheriff's office, which he subsequently did on the morning of the issuance of the subject Search Warrant.

The defendant alleges that the affiant's allegations that the owner of the subject premises had contacted the sheriff's office with information regarding a possible clandestine laboratory is clearly a factual misstatement. The information given to the sheriff's office appears to have been interpreted by either the deputy receiving the information, or the affiant himself to involve a possible clandestine laboratory operation. The defendant further alleges that the owner of the subject property at no time informed the sheriff's office that he suspected a possible clandestine laboratory operation. On the contrary, the affiant's own incident report confirms that the owner believed that there was a possibility that the tenants were manufacturing some plastic. Furthermore, a careful reading of the affidavit shows that the affiant was attempting to define the sweet smell that the owner detected at the subject residence, as a smell of ether. However, the owner could not make such a determination and informed the affiant that he was unaware of whether he would be smelling ether if in fact ether was present.

The defendant contends that the allegations that information had been received regarding a possible clandestine laboratory operation were clearly misstatements made for the purpose of convincing the magistrate that the affiant not only had reasonable suspicion that there was such an operation at the subject residence, but was made for the purpose of justifying the affiant's visit to the subject residence wherein the affiant alleges to have made certain observations both visual and by way of smell.

It is most significant to note at this time that the sweet smell detected by the owner of the subject premises was so detected on August 1, 1981. On August 3, 1981 the affiant alleged that, after receiving information from the owner of the subject premises regarding his observations on August 1, 1981, he, along with two other sheriff's office personnel drove to the subject residence. At this point, it is equally significant to note that the affiant is a detective with select investigations with the sheriff's office, with his office located in the City of San Bernardino. It is further

significant to note that both Deputy District Attorney Morrissey, who conducted the preliminary hearing in this matter and the Deputy District Attorney submitting responsive pleadings in this matter acknowledged that the affiant suspected that a clandestine laboratory operation might be located at the subject premises. (See R.T., June, 137, 7-17, and Memorandum in Opposition to Penal Code Section 995 and 1538.5 Motions.) Prior to visiting the subject residence, the affiant informed the magistrate, by way of affidavit, that when the owner visited the premises on August 1, 1981, he walked around the residence via a catwalk, and upon arriving at the rear of the residence, where a sliding patio (door) is located, he noted that the door was open and the screen door was closed. The affiant then informed the Court that "the informant told Deputy Roper that he smelled a sweet smell at this time. . .". Subsequently, the affiant informed the magistrate that as he approached the residence, the owner "smelled a strong sweet odor". Subsequent, on August 3, 1981, the affiant alleged that he smelled a strong odor of ether upon the highway where he parked his vehicle, which is above the subject residence. Defendent intends to submit into Court photographs of the subject residence in order to allow the Court to make a visual observation as to the layout of the subject premises, and the possible distances between the rear of the residence and the highway where the affiant alleges to have first detected a strong odor of ether.

The defendent alleges that the affiant's allegation of a strong smell of ether both upon the highway upon exiting his vehicle, and emanating from the interior of the residence, via the screen door at the rear of the residence, is a material misstatement of fact. The defendant intends to submit to this Court by way of testimony, an expert witness who will tell the Court that it would have been impossible to smell ether at the location first described by the affiant upon the grounds that ether was not within the subject premises at the time the affiant alleged to have detected its odor (R.T., June, p. 117, 20-25), and based upon the absence of ether, it would be impossible for its smell to remain in the open air surrounding the subject premises for any period of time.

Based upon the above, the defendant alleges that this material misstatement was made for the purpose of convincing the magistrate that there were some exigent circumstances which justified the affiant in approaching the subject premises and making a further search in order to confirm his original suspicions that a clandestine laboratory was in operation. Clearly, the case of *People v Cook*, supra, prohibits confirmatory searches. Therefore, had the affiant alleged that he approached the premises solely for the purpose of confirming his suspicions, the issuing magistrate would have been obliged to excise those statements and his observations subsequent thereto for purposes of determining whether

there were sufficient facts to establish probable cause.

In addition to the above, the affiant alleges that upon detecting a strong smell of ether after exiting his vehicle on the roadway above the subject residence, he approached the subject residence "to remove any doubt as to where the odor was coming from ...". Yet, during his testimony at preliminary examination on April 14, 1981, the affiant testified that he was "sure of the source ...". (R.T., April, p. 88, 4.)

Again, this defendant alleges that the affiant's allegation that in addition to his concern for the safety of anyone in or around the residence, that he was approaching the subject residence "to remove any doubt as to where the odor was coming from", is clearly an intentional misstatement made for the purpose of leading the magistrate to believe that it was necessary for him to approach the subject premises, and thus further establish exigent circumstances and avoid the striking and/or excising of any of his observations made subsequent thereto.

The foregoing outline delineates, with specificity, the defendant's reasons for believing that the Affidavit in Support of the Search Warrant issued for a search of the residence located at 24601 Lake Gregory Drive in Crestline contains several factual inaccuracies. Furthermore, the defendant has submitted his reasons for believing that said inaccuracies are either material misstatements of fact, or material omissions of facts, each of which were made solely for the purpose of deceiving the magistrate and leading the magistrate to believe that exigent circumstances existed at the time of his arrival at the subject residence which justified him in making a confirmatory search, from which he made certain observations which were included in his affidavit for the purpose of establishing probable cause for the issuance of the subject Warrant. The defendant alleges that even if the above factual inaccuracies were only reckless, the subject Warrant must still be quashed. Furthermore, this defendant alleges that even if the said inaccuracies were simply a result of the negligence of the affiant, it is the people's burden to show that the affiant unreasonably forgot to include the subject information and/or facts, or that there was some privilege, or that the same were reasonably omitted. With regard to intentional misstatements of fact, however, as outlined above, there is no requirement that the defense show that the affiant had an intention to deceive the magistrate. (22 Cal. 3d at 91.) On the contrary, with regard to intentional misstatements, the defendant need only show that said misstatements were by their very nature perjurious, and were made intentionally. The defendant points to the allegation in support of the Affidavit for the Search Warrant issued at the Crestline residence wherein the affiant alleges that he had contacted fire department officials to assist in the investigation. Clearly, such a statement, when false, constitutes a perjurious statement, and as

such, is grounds alone for quashing the subject Search Warrant. Furthermore, the affiant's allegation that he found it necessary to approach the subject residence to remove any doubt as to where the odor of ether was coming from, is again clearly an intentional misstatement as can be noted from the referenced testimony of the affiant. As such, the same would again be grounds to quash the subject Warrant.

The omissions outlined by the defendant clearly are "material" as per the definition of this term, outlined in *Kurland, supra,* and even if the Court determines that they were not reckless or intentional, the Court must include the same in the subject Warrant, and re-examine the Warrant for purposes of probable cause. If, on the other hand, the Court determines that said omissions were intentional, and were omitted for the purpose of deceiving the magistrate, the subject Warrant must be quashed, whether any such omission is ultimately considered to be material. (28 Cal. 3d at 390.)

## OMISSIONS

In submitting an Affidavit in Support of the Search Warrant, the cases clearly show that the affiant must not mislead the Court by way of factual inaccuracies, whether they be intentional misstatements, intentional omissions, or impermissibly negligent reporting of the facts. (*Theodore, supra; Cook, supra;* and *Kurland, supra.*) The affiant does not allege that he observed any particular items, activities, etc., which led him to believe that any particular criminal activity was taking place. Specifically, during the course of his testimony in June, 1981, the affiant testified that upon making his observations at the Crestline residence, he believed that he had found a laboratory that was in the process of manufacturing something, but that he had no idea at what stage the process had arrived. Furthermore, affiant testified that from his point of observation he could not determine the whole process that was involved. (R.T., June, p. 117, 26; p. 118, 1-13.).

After reading the subject Affidavit thoroughly, and in light of the affiant's testimony as outlined above, it becomes clear that the affiant had no information to submit to the Court which would justify a reasonable magistrate in believing that some criminal conduct was taking place at the subject residence...

...In addition, and it's still considered a misstatement — we're talking in the same area of law. It's called by the courts, though, an omission. And with respect to omissions, they must be some kind of material omission to be grounds for quashing, and they must be intentionally omitted.

There need be no showing that they be for the purpose of deceiving the magistrate, however. The court's made it clear that that is not the guideline. The guideline is simply that it is intentional and it is material. And materiality is defined as something that — a fact that were it inserted in the affidavit, the court might — might make a different conclusion.

Now, in my outline of Section 1 — or paragraph one of Section 1, I pointed out statements in the affidavit that were contained therein that I believe to be misstatements. I believe probably the most obvious misstatement is the statement in the affidavit by the affiant that upon making certain discoveries in the cabin, through this sliding glass door we've been discussing this morning, he then contacted a patrol unit, and then contacted other Sheriff's Office personnel and the fire department to assist in the investigation.

That clearly is not accurate, not only from the testimony we have from Miss Franklin, that it was sometime in the afternoon, which turned out to be about 5:30 p.m., that the fire department was dispatched, and considering the time that the affiant first appeared on the scene, which was around noon that day, we've got a five to five and a half hour span prior to those people being contacted.

Now, the question of intention is going to have to be left up to the court, but one must question why that was written in the affidavit if in fact the fire department wasn't contacted until the warrant was executed by the judge.

Secondly, that goes also to the issue of was there in fact a fire hazard. Well, I've cited some of the testimony — and again, that's why I question whether testimony is in any way relevant or would serve any purpose.

We have testimony in the transcripts of the preliminary hearing by the affiant himself subsequent, about nine months subsequent, to the issuance of the search warrant with respect to the concerns about fire hazards. The question again becomes, why would the affiant put into the affidavit that he'd contacted fire officials?

Well, you have to read the entire affidavit and recognize that one of the first reasons for setting foot on the subject property was the allegation of a strong odor of ether, and that the affiant knew the volatile nature of ether, and that he was concerned about anyone in or around the residence. Therefore, he approached the residence in order to make a determination whether there was anyone inside and so forth.

We're also in the mountains. And I think the Court can take notice that there's certainly a fire hazard in the mountains, or if something could explode or could cause a fire, everyone is concerned the big trees will burn and it will go all the way across the whole mountain.

So we have allegations in the affidavit to suggest there is a fire hazard. And a further allegation that the fire officials were contacted at the time of the first visit to the residence. Wasn't true. That wasn't when they were contacted.

Now, intent can be a reckless disregard for what one is doing, and the cases delineate that also, both Cook and subsequently Kurland, which dealt with omissions. I think the Court looked at intent also as recklessly inaccurate or intentionally misleading.

Well, perhaps the affiant didn't intend to mislead anyone, and I don't know whether he did or not. But I think the Court has to look at what is before it. If nothing more, it was recklessly inaccurate, signed under penalty of perjury and presented to a magistrate for his signature on the search warrant as the facts the affiant had before him and of the things he had done. And this is one important fact that he had not done.

And it's also important because subsequently, during testimony during the preliminary hearing, all of which is cited in my pleadings, by page and line, the affiant testified that he did not go into the residence because he knew that if there was going to be a fire or explosion, it would already have occurred. Well, that takes the fire hazard problem out of the way.

So again, why would that be put in there? Was it just something that happened along the way? Something that hadn't taken place yet, and in fact, didn't take place for five or five and a half hours later?

I suggest that that is one misstatement in the affidavit.

And I delineated each and every one of them, beginning on page 13, danger of fire or explosion is the first section.

At the time of the discovery of the cabin — well, strike that. Not of the discovery of the cabin, but at the time of his arrival and his subsequent, what we would call confirmatory search of the cabin, the affiant, as I stated, put in the affidavit that he contacted fire officials, among other people, to assist in the investigation. The affiant's words, mind you.

Subsequently on testimony, he testified that he did not request any fire officials or fire units or alert the forest service to come into the area. So he's contradicted his only statements in the affidavit — or statement in the affidavit.

Secondly, there wasn't any exigent circumstances existing at the time, although reading the affidavit, one might think so. And I would acknowledge that an exigent circumstance, or an exigency is one of the exceptions to the requirement for a search warrant.

If one can determine that there is some emergency inside a residential dwelling, go in and search. But again, we have that there was — there was no contact with fire officials, and we also — and that's testimony of

the affiant.

And further testimony of the affiant is that he did not think there would be an explosion, or a fire. So his own statements in the affidavit have been controverted by his own testimony.

And clearly, we have a series of misstatements. We have misstatements about the concern for fire, and we have misstatement — and a misstatement about the contact with the fire officials at that time.

In the abstract, one at a time, they may not mean anything. But when you look at the whole picture — which is one of the reasons People stress it was okay to get down the stairway and walk around the premises, because of this concern, this fear for the people in the forest. And today was one of the statements as to why some of these photographs were relevant, to show the area, because of the concern about the possible fire hazards, which I believe your Honor stated —

And yet when we look at subsequent testimony, we say, well, there wasn't any such concern. Why were these things said? And I believe that that's a fairly clear showing.

There are misstatements. The misstatements had some purpose. Whether they're intentional or reckless, the Court has to make that determination. And upon making that determination, then it's the People's burden to offer evidence to explain them.

Go also to the — No. B, begining on page 15, the discovery of a possible clandestine laboratory.

Now, in the affidavit, the affiant suggested two things. He suggested, one, that the owner of the property suspected that there was a clandestine laboratory operation taking place at his residence, when in fact that's not true.

Referring to the police report, referring to the owner's own statements, and also making reference to the difference in time between when the owner first came to the residence and discovered whatever it was he discovered and then contacted the Sheriff's Department, which was August 1st, when the owner went to his residence and smelled this strong sweet smell and thought that there was — that they were making some plastic.

And he was upset, but he wasn't upset about somebody making drugs. Because as he stated, he thought they were making plastic. He was upset at the condition of his residence. He in fact told either Deputy Roper or the affiant that he was going to contact the realtor and have them evicted.

And why did he stop? He stopped because they had the lights on outside and he paid the utilities. And there's no statement by that person that he smelled anything until he came to the rear of the residence. And I made reference to and it's attached to the pleadings, the affiant's own

incidence report, which was the same day, which was August 3rd when he was finally contacted.

And also I think it's fair to state that if the owner of the property, who was terribly upset that whoever was in there was manufacturing some plastic and had left the place in a mess, was concerned about either A, a fire hazard, or B, some illicit or illegal activity, he probably would have responded to law enforcement authorities right away. But in fact he waited 48 hours before placing a phone call. Then it was only a suggestion of his son that it might be something other than the manufacturing of some plastic, that he contacted the Sheriff's Department.

So we have also another set of misstatements. And I think it's misleading for the purpose that if the owner had contacted the Sheriff's Department and said, I think somebody is up in my cabin that I rent manufacturing drugs, narcotics, illicit narcotics, certainly that would authorize the affiant to head on up there and check things out.

But in fact, by his own testimony, the owner didn't ask him to show up — or to go to the residence, nor did he know that he was going. The affiant chose to go on his own, based upon his own suspicion, which perhaps all of us have our share of hunches that turn out to be accurate.

But I think the Court is well aware that hunch is not evidence, and it's not admissible for purposes of determining probable cause or anything else. It's a gut level feeling by a human being that can't be felt, heard, seen or examined by anyone else. And that's why it's not admissible, even though courts acknowledge that experienced officers may have those kinds of things which later turn out to be correct.

The affiant felt there was a clandestine laboratory there. That's why he went. It wasn't because the owner told him he thought that. The affiant went to confirm his suspicions.

The People have responded to my pleadings and have acknowledged that. They acknowledged that's why he went there. He thought there was a lab and that he went to confirm it.

That's a confirmatory search. It's clearly prohibited by Cook. Any evidence, anything seen, anything perceived through the senses during the course of a confirmatory search is not admissible; it cannot be used for any probable cause determination in an affidavit in support of a search warrant.

THE COURT: I have some trouble with this concept, and maybe I'm not understanding your general thrust.

If the citizen, landlord, whoever it is, calls up the Sheriff's Office and says, "God, there's this PCP lab going up here in the mountains."

"Oh, yeah? How do you know?"

"Well, because I could smell it, has this ether smell, and I'm really concerned about it."

At this point, the officer has information which tells him there may be a PCP lab up there, and what does he do? He goes up to confirm it.

How do you distinguish that between — that situation and a citizen calling up saying, "There sure is a funny thing going on at my house"; describes the smell. "And I think they may be making plastic up there. But I want to report this." And the officer mentally puts two and two together and says, gosh, this is probably a PCP lab going up there; better go up and take a look.

Why is one bad and and the other good?

MR. SMITH: I think they're both bad, your Honor.

THE COURT: You said if the guy called up and said there's a PCP lab going up here, it would be okay for him to go look.

MR. SMITH: I did not say that. I said that was not what was said. We are not dealing with PCP in this case. We're dealing with methamphetamine.

THE COURT: Well, I know.

MR. SMITH: I'd like to direct the Court's attention to *U.S. v Tate*, et. al., where the Ninth Circuit Court of Appeal held that the smell of ether alone is not grounds for probable cause for issuance of a search warrant.

The expert in that case happened to be Dr. Sims, who testified here.

THE COURT: Right.

MR. SMITH: The court noted — and I think it's an important educational point for the entire public. For example, Miss Franklin said, if you smell ether, there's drugs; that's what they're used for. People forget that people used to be anesthetized with ether; that people start trucks with ether. And most importantly, Dr. Sims pointed out, it's the most imporant solvent in organic chemistry.

Dr. Sims also pointed out something that really bears on what Mr. Morrissey was trying to point out with his photographs. A laboratory operation. Be honest with you, I've looked through them, and I'm not sure what's going on there either. I'm not a chemist, and I doubt, item by item, that there's nothing anyone can say without an analysis that those pictures depict.

Dr. Sims more importantly testified that he had set up labs in numerous private dwellings he rented solely for research, where he was discovering new compounds, written 80 articles on the compounds he discovered, and that was a very common practice among members of his profession. And it was more likely than not, it he discovered such a lab, it was not for illegal purpose. And ether would be likely used because it's the most common solvent, 200 uses. And because of the ether alone, absent exigent circumstances, it cannot be used for grounds to walk on the property.

But the People have acknowledged that that was the reason for him to

walk on the property, to confirm his suspicions. There's simply no way around; that is not permitted. Going into a dwelling and grabbing a marijuana cigarette and so forth, using as a ruse the manager in an apartment building so the investigators could go up there and make a view inside the apartment to see what was going on.

Court said, no, you only had one reason to go there: to confirm your suspicions, to gather evidence for probable cause for the issuance of a warrant. All of that information, and perceptions and so forth, have to be excluded. You can't look at that, because it's improperly gathered. In fact the court calls it unlawful.

I suggest that is what happened here, and the People agree. There's not even an argument on it. That was why the affiant was there.

If the affiant smelled ether up on the highway as coming from the house immediately as he was exiting his vehicle, as was stated, it's probably fair to state there's probably a very large quantity of ether somewhere, and there is some kind of an emergency situation.

But there wasn't. And that's by the testimony of the affiant himself.

So why did he go down to the residence to look? To confirm there was a lab there.

Now, he was told over the telephone what the owner had seen. And sounded like a lab to him. But the next question is, what was told to him over the phone that make it something that law enforcement should be concerned about?

In fact, I suggest to your Honor there's nothing in that affidavit that shows that there was anything illegal taking place, or even enough to raise a suspicion, except that perhaps the public and the court was unaware that this is a fairly common practice.

We may read one of these days about some chemistry professor being raided and all kinds of bindles of white powder being taken, and it turns out to be soap. Dr. Sims testified to the Court that from everything he read in the affidavit, it could have been soap.

From the observations made, there was nothing delineated as items seized in the return to the search warrant, nor anything specified in the affidavit in support of the search warrant, that would indicate that any of the items were special to any particular kind of experiment, not that any of the things seen were special to the manufacture or synthesis of anything.

And the visual perception of some white powder, it could have been soap. It could have been a lot of things. So does that make it more likely than not that there's criminal conduct taking place? I don't think so. I think perhaps because of that lack of information on the part of the public, on the part of law enforcement, on the part of the courts, that that might have been used for that. Now we know it wasn't. It could have

been anything. It could have been Dr. Sims up there working on some new soap, but it wasn't.

But not getting too far away from the issue of confirmatory search. The People acknowledge that. Therefore, everything seen by the affiant that he described in the warrant and everything else he saw to try to show the Court to this day, cannot be included in the warrant.

So then you must — you excise all of his visual perceptions and his sensory perceptions, and there's nothing. There's no affidavit, except his expertise and the date and maybe the phone call by the owner.

Other than that, though, anything from the time he arrived at the property to the time he left to go get a search warrant isn't admissible for a probable cause determination. And that's the Cook case.

Okay, now, we have a third argument, which is the smell of ether. This is kind of an interesting and I think technical area. But it's also one that apparently the public, law enforcement, and the courts weren't educated about.

Yesterday we had an individual testify that she smelled ether once for ten minutes a year prior to August 3rd, 1981. And based upon that and someone telling her that there was a PCP lab in operation, she decided that what she smelled was ether.

But I'm fairly sure that the People would agree that she was never qualified as an expert. In fact, I'm not sure she's qualified as a novice. She didn't know what she had smelled that day, other than gasoline and natural gas and ether. But there were several other chemicals. She didn't know what kind of ether she smelled. She didn't know that day where the smell was coming from. She believed it was coming out of the cabin.

And if in fact it was, her testimony is irrelevant for the purposes of corroborating the affiant, because the conditions were changed. The front door wasn't open when the affiant went there. We have the front door and the back door open now, when she was there, and a wind allegedly blowing from the back of the house to the front of the house, wh..d would give reason why the smell might be up on the highway. But she was at least a hundred feet away.

And not only that, she didn't know whether there was a container of ether or anything else that might smell like ether, like maybe this court reporter's ink that I think his Honor thought was ether in court one day. Whether any of these items in the car were near, and allegedly her smell of ether couldn't be considered experienced for the Court after listening to the testimony of Dr. Sims.

I bring up — remind the Court that Dr. Sims told us that there are at least ten chemicals that smell so similar to ether, that the average person couldn't tell the difference. And that in fact it took him quite some time to tell the difference. And also, that once an individual smells a strong

chemical, it's hard to tell what else he is smelling, because the senses become overwhelmed.

I think probably ethyl alcohol is something that smells very similar. I don't know if court reporters use that in their machines or not to thin up the ink, but possibly that's what the Court smelled that day. Possibly there was nothing in the air and it was just the fact that we were discussing that so much.

The affiant was told over the telephone by the owner of the property on August 3rd that there was a strong, sweet smell in the air. As he looked in through the screen, which normally covers sliding glass door, which was apparently open, and he smelled something, a strong sweet smell, the affiant immediately asking if it was ether he smelled or did he know the smell of ether, He said, no, I wouldn't know it if I smelled it.

That indicates two things. One is that the affiant thought ether — that's what he's smelling, ether. And I think also it's fair to state that if the affiant thought if there was ether in the air, that there was definitely a drug lab.

That's what the agents thought in the Tate case. Because they smelled ether, there was a lab, there was a clandestine lab for the manufacture or synthesis of some narcotic. They thought PCP.

Well, the Court said you've got to have more. That's just not enough. And the court said that because Dr. Sims explained to the Court and taught the Court that the smell of ether doesn't mean too much. It could be anything.

And more likely than not, considering that there are a couple hundred known common uses for ether, none of which involve any criminal activity, and only a couple known uses for ether that involve criminal activity, it's about 200 to 2 that it might be some criminal activity. I would say that is not a more likely than not in favor of probable cause kind of statistics. I would say in fact, the evidence, absent more, is overwhelmingly in favor of a nonfinding of probable cause.

Now, what would have constituted probable cause at a later time I don't even want to suggest. And that's certainly up to law enforcement to make those determinations and make their applications.

But the bottom line is, was there enough there for the magistrate to say to himself that it's more likely than not that there is some criminal activity taking place at this particular residence, and the items sought to be seized will be located there.

Well, looking at the items sought to be seized in the affidavit, you have a list of chemicals. And they are by name. There's absolutely no showing in the affidavit that there was any specific chemical located on that property. None. There was some crocks, there was some chemical bottles, there were some standard laboratory equipment, all of which,

absent some specificity, our expert told us, could have been anything.

That certainly doesn't make it more likely than not. In fact, if one bases it upon the smell of ether alone, which was the reason to come down and look, I would say that from here and after, law enforcement should be expecting to find Dr. Sims or one of his associates rather than somebody manufacturing PCP or methamphetamine, unless we've got some testimony to the contrary, which we don't.

So we have the issue of the smell of ether. We also have the affiant's expertise, background and experience. And — at the time. Not today. I think at the time, he'd been with select investigations for a very short period of time. He had a one-hour training course and certainly spent some time with some of the officers. And he said he participated in the investigation of clandestine laboratory operations.

Okay. Gut level, he may have known what he saw. But he didn't tell that to the magistrate. He specified what he saw. And I think I read it into the record this morning, but it really wasn't a whole lot.

He saw some standard laboratory equipment, which again, our expert said didn't tell him anything. He knew how to make PCP and methamphetamine, and he knew how to synthesize and manufacture all kinds of other things that weren't illegal and used ether for every one of them. So there wasn't anything in the affidavit that would tell a magistrate that there's criminal conduct taking place.

If that's not there, maybe it was because of the alleged exigent circumstances: the fire hazard. That's not there either.

You heard him testify that there wasn't going to be a fire. And he didn't contact fire officials to come into the area, and he didn't because he didn't consider it an emergency.

Bottom line again, he was there because he suspected a clandestine laboratory operation, and I have come to interpret that term used by the affiant as being any illegal operation, and he wanted to check it out and make sure. So that's what he did. The People have admitted it. That's why he was there.

There's another real important point. I think. And that's after coming back to the residence with a search warrant —

May I have a moment, your Honor? I have a stranded individual here.

THE COURT: Yes.

MR. SMITH: — which was about five and a half hours later. And during the time from the affiant's first visit to the residence — from that point in time to the time that he returned with a search warrant to serve, there was a uniform deputy to keep anybody from coming in and disrupting anything, from setting off an explosion, whatever. There was a deputy there.

So we can assume from that that no one involved in this case anyway, or no one that was visible, came in and took any ether out of the premises. Yet there wasn't any ether found. Not a bottle of it, not a gallon of it, not any amount of it. Even though our expert told us that it could have been a swimming pool full, and even if it was covered and allowed to dissipate slowly, that the smell wouldn't stay in the air very long.

We have a smell that is probably hanging in the air for a couple of days because of the initial discovery by Mr. Marvich on August 1st and the subsequent discovery by the affiant on August 3rd. We don't know that to be true, but I think it's a fair guess. And we also have the testimony of the expert that ether doesn't rise. Ether is heavier than air. so it travels downward.

Now, that may or may not be significant, depending upon the facts of the case, but it sure is here. Because we have a house that is below the highway, but we have a smell that is apparently being detected up on the highway above the house.

Now, we have a young lady that was testifying as to some breezes and/or wind the other day, but she wasn't there when the affiant was there the first time, so I think that's totally irrelevant, and we have no other evidence in the record to that effect. We don't know.

But it was a warm day. And we do know if there was some kind of ether fumes that were in the air, that they wouldn't have lasted very long. According to our expert, maybe an hour, normally a half hour, depending upon the temperature.

We have evidence that it was about 83 degrees, peak heat, that afternoon. 12 noon isn't exactly peak heat, but the sun doesn't set at 6 in August either.

So the question becomes, did the affiant smell anything? I don't know. He said he did. But was it ether? And even if he did smell ether, so what? Is that evidence of a crime?

We know it wasn't evidence of a possible fire hazard because he said so himself.

So he smelled ether. So what? So he saw some laboratory equipment and some packing crates and so forth. So what? None of that thus far is evidence of any kind of criminal conduct.

I think there's been an assumption all along by all the parties involved that that somehow indicated that this was an unlawful activity taking place here. I can go home and try to make some soap tonight, and someone might come up and observe that and get a search warrant to search my house, or to search Dr. Sims' house, or one of the places he rents when he needs to get away to study or to come up with something new.

That's what takes place. And the odds are, according to our expert, 200 to 2, or 100 to 2 in favor of something lawful.

And of course the Court is precluded from looking to what was discovered as to make a determination as to whether the affiant was accurate in his hunch and accurate in what he saw as being something that was evidence of a clandestine lab. We're looking at the warrant itself, the affidavit in support of the warrant, what was cited in that as facts in support of probable cause. That's what we're challenging.

But given the testimony of our expert — and he certainly was not impeached, and the Ninth Circuit believed him — it would be highly unlikely that the affiant would have smelled ether on the highway. In fact, probably impossible were I think his words.

That's doesn't mean he didn't smell something. In fact, he said there were numerous chemicals that could have smelled like ether.

Now, the affiant delineated his experience, and I don't think that it near compared with that of Dr. Sims as to the ability to detect various chemical smells in the air. So it's very possible he did smell something. We don't know what.

Miss Franklin said she smelled something, too. But she didn't know what. She didn't know where it came from. She thought it was familiar. And when somebody said PCP lab, it had to be ether.

And I think that probably — and this is why I've continued to say misstatements and not lies — probably the affiant expected to smell ether and he smelled something in the air, and he believed it was ether. But I don't see how it could have been.

According to our expert, in fact, it would be impossible for that smell to be in the air if there was no ether found in the area or on the premises. And there is no evidence before this Court that there was any found. And I think the People would have to stipulate there wasn't any found.

There's been a suggestion or two that there might have been some ether inside, in chemicals or whatever, mixed with things, but I think our affiant clarified that, too. Ether is not an ingredient. It's a solvent which is extracted from a finished product.

So we don't have any ether there. We don't have any analysis before the Court that there was ether there. Couldn't have been ether he smelled.

But let's assume that he did, for the moment, and was worried about — well, let's assume he did. So what if he had. But I think our expert made it clear, that wasn't what he smelled. We still to this day don't know what he smelled. But he wanted to smell ether. Because he believed from what Mr. Marvich told him that he discovered a lab. And he went up there to confirm it.

Now, while we had Dr. Sims testifying, your Honor acknowledged,

which is in the record, or asked Dr. Sims if he had been around ether, because your Honor smelled ether. I think the point in all of that is, you can think about things, you can want to see something, feel something, smell something, and for your own senses, you will. A lot of people see ghosts, but nobody has proven they exist. Maybe they do, I don't know. But maybe they didn't see them either.

But there certainly wasn't any ether in the courtroom that day. And if it had been, it probably wouldn't have been as high up as the bench. It would have been down on the floor, unless something was pulling it up.

So again, it's maybe a lack of information on the part of everyone concerned. But it's a fact, and it's the truth, and no one can deny it, and no one has, that ether, the smell of it alone — and as I say, I stress, and although it's not determinative of this Court's decision, it's entitled to great weight and consideration, the Tate case, a very important decision and very well written, said that's just not enough, the smell of ether. And the People responded with the smell of pot cases.

Well, marijuana has its own smell, as far as I know. And I haven't heard of anything that smells just like it that would be used for something more likely than pot so that it would obviate a probable cause finding. And the same with opium.

And that's what Olmstead was about. You're talking about something that is very distinct, and clearly — and maybe somebody can correct me on that, but I don't know of any legitimate or legal use for smoking of opium in the United States. So when someone smells opium smoke, they know what's going on.

But not with ether. That's not the state of the law anymore, and that's not the state of science. It's just not a fact. But it's something that was relied upon as an indication that here we are, we have a lab. Classic example is Miss Franklin. She really thought, if you smell ether, you're going to find a drug lab.

So perhaps we've all been laboring under a misconception or lack of information, but we're all informed now, and that's the truth. And I don't see how there could be any different finding.

There's nothing that the affiant can add today to change his affidavit. And if we look at it solely on its face, whether it's respect to misstatements, which he contradicted himself during his own testimony — and I would not ask him to come up and try and say something new; whether it's the expert testimony that clearly miscredits the theory that the smell of ether means that something illegal is happening; or whether it's the fire hazard theory that's clearly been taken care of by the People, by the affiant himself acknowledging that he didn't call fire officials and that he didn't really fear for fire. There was no real concern about that. If there had been, it would have already happened. Or whether — whether

there was a confirmatory search.

I pointed it out in my pleadings — it's all here, and everything I've discussed is in the pleadings, and I'm sure the Court has read my argument. The People don't deny that it was a confirmatory search. They admit it. Cook says, they take all that stuff out, now let's look at it. Take it all out. They don't have anything, nothing.

Possibly Cook would say you can stand on a highway and sniff. Mr. Morrissey said, well, okay, maybe it's not grounds for a search. But it's sure grounds for an investigation when you smell ether. I don't know what would — what the difference would be in this case.

We argue it was a search when the affiant and others with him came down the stairway on this very private place, which your Honor acknowledges is a pretty private place, walked around the deck to the back door — the only way to get there, by the way, being by the decking. You can't get there on the ground around the back, since it's about 20 feet up above the ground, which the photographer testified.

So coming around to somebody's back door is — you can call it an investigation, but it's a search. It's viewing things and seeing things and perceiving things from a perspective where the person is not entitled to be there. There is no implicit invitation, no express invitation for the affiant to be on that property at the time.

And, in fact, I think the Court would acknowledge that the owner doesn't have the right to do that. It's not his property when he rents it out. And it's clear the affiant knew that it was rented, because there was a discussion of that in the affidavit. So — and I don't think there has been any argument put forth that he was even invited there. In fact, he testified he wasn't.

So he's there to confirm his own suspicions. And he's on private property, in what I consider a very private place, to confirm his suspicions. It wasn't as though he was off with one of the five houses we talked about. He wasn't on the highway looking down on the decking, because you can't see it from the highway. You can only see it from the back.

He had been told what was there. But your Honor has read it, and there's nothing that shows there's any crime. There wasn't a dead body, there wasn't a machine gun. There wasn't something that was clearly visible and clearly evidence of illicit or illegal conduct.

So down to the odds being a hundred to one, we don't have any reason to be at this cabin, none. And that's what the People are stuck with. It's their own case. It's their own facts. But those facts aren't enough. I say you have to excise all those observations.

Even if the Court doesn't, what do we have? We have the affiant who tells us that he has discussed his reasons with other officers for believing

that there's a clandestine lab. He didn't specify in the affidavit what those reasons were and what those officers said and how combined —when all of those things were combined, he was sure that there was some kind of lab; he was convinced; there was something specific he saw there that indicated it. He didn't.

And again, to our suggestion today about these photographs, we've never challenged what he said he saw, never. And we don't today. But he didn't say he saw anything that is evidence of criminal conduct. And I think that before that warrant must be — it was properly issued, the magistrate had to say, well, from what he has said here, it's more likely than not that there's criminal conduct taking place. That's the probable cause determination. And going one step further, that the items sought to be seized will be on the property sought to be searched.

What in the affidavit said that any of those particular chemicals were going to be there? What information? Again, according to our expert, it could have been soap. So he wouldn't have been using methylamine and all these other things, I don't think. I presume that some of those chemicals listed are specifically for the purpose of manufacturing either methamphetamine or PCP; otherwise, they wouldn't have been listed. And I think they were delineated as such in the affidavit: Items used for the manufacture of.

That's another important point, though. The affiant wasn't sure. He thought, illegal, drug, lab, methamphetamine or PCP. And maybe he can tell me differently later, but I think those are probably the only two things that we manufacture or synthesize here in America. I think heroin processing is completely different, and you grow pot. It's pretty well limited to what it could be if it was illegal. But he didn't know.

He also testified on cross-examination during the preliminary hearing that he knew that something was being manufactured. And again, I use that term as it has been used in the affidavits, because we've also learned that that's not a proper term. It's synthesis, or synthesized. He knew something was being manufactured, but he didn't know what stage it was in. He didn't even know what it was.

Gut level what it was, or what he thought it was. But that gut level began with a telephone call, not with an observation. And nothing, according to his observations, according to the affidavit, changed all of that. He didn't see anything that is specific to an illegal lab, or clandestine lab. Nothing.

It's not specified anywhere, it's not in evidence anywhere. It never has been. And it's not necessarily a lack of experience or anything else. It's because, one, none of the chemicals were labeled that we know of, because he didn't put it in the affidavit.

He didn't know what combinations of things were taking place. He

saw some white powder. But again, most soap — my wife uses Tide. I don't know what color the other ones are, but that's white powder. And he didn't see anyone in there putting it up their nose or in their arm. So there's no reason to believe that it was anything other than someone trying to improve Tide. And I defy the People to come up with something that shows that it was criminal conduct.

We have also this past experience. It's been my experience — and we'll get to that — I think it's more significant in the other two warrants, but I anticipate the People are going to argue because he's an experienced officer and he's been to PCP and methamphetamine labs, that's enough.

Well, one, he wasn't in a lab in operation. He was on a deck looking through some windows. And apparently it was not in operation, whatever it was.

And secondly, his sense of smell appears to have been the primary source of detection. He did not tell the Court, the magistrate, the issuing magistrate anything, nor has this court seen anything in that affidavit that would say, I, as the affiant, have had X,Y, and Z experience, and because of this, I know these six things are used only for methamphetamine.

And I'm glad he didn't. Because our expert said there wasn't anything specific there to do that. Our expert says it is the same ingredients he would have used to make soap.

I went a long way from misstatement. But I think you have to look at the whole picture. I don't think there's any way around that the affiant called the fire department is a misstatement. And I don't see how it could just be negligent when he knew he hadn't called them at the time. He probably intended to right away as soon as he got that warrant signed. But he testified he didn't.

That's clearly intention. The purpose of it, I don't know. Maybe he was just in a rush. Well, if he's just in a rush, he's reckless. Because he signed it under the penalty of perjury. And that's a key test. Was this something that would constitute perjury? Well, if it's a misstatement, if it's not true, and he wrote it down under the penalty of perjury, I'd say that's pretty easy to decide.

And the reference is made in my pleadings to Penal Code Section 125, which defines perjury. And I think also, looking at Cook, the court makes extensive footnotes in Cook in reference to misstatements on the part of officers.

And that's why, again, I've continued to call them misstatements. Because sometimes people lie, and sometimes they just misstate things. And I don't care to get into that. I don't think that's relevant. I don't think it needs to be a personal thing. It's a fact finding hearing before the

Court. It's a misstatement. And there's no way around it. There's no defense to it. So I think the Court has to find it was a misstatement.

I also outlined some omissions, and that it was intentional misstatement.

Another misstatement I allege that I forgot about. In the affidavit in support of the search warrant, the affiant wrote under the penalty of perjury that immediately upon exiting the vehicle, he smelled the strong odor of ether up here on the highway, and that was the reason he came down to the premises. And his reason for it was, among other things, in order to remove doubt as to where it was coming from, the source of the smell.

He later testified he was sure of the source. Maybe he didn't mean to testify to that, but I don't know. But it's sure a misstatement to me. Remove doubt as to where it was. But if you were sure of it, there's no doubt.

I'd like to direct the Court's attention to page 18, lines 19 through 22, where I'm quoting from the affidavit in support of the search warrant: When the owner of the premises first smelled something, which he called a sweet smell — a strong sweet smell . . . .

Some people say ether is sweet. I've smelled it a couple times. I don't think it's sweet. I don't know. But I recall asking the expert, and he says he doesn't think it's a sweet smell either. He smells it most every day. Some people think so.

So the affiant thought that was ether. But the key point there is that the owner didn't smell that smell until he was back around looking through the screen door, the same place where the affiant made his ovservations about this laboratory operation. He didn't smell it up on the street. He didn't smell it anywhere. He smelled it right there.

Now, as to omissions. The People versus Kurland, the Court determined that certain omissions, if they're material, or any omission in fact in an affidavit determined to be material is ground for quashing the warrant.

Same thing with intentional misstatements of facts. We've shown the Court a couple of them. And it's not a may quash, it's a must quash, it's a must quash and must suppress. That's it.

Same thing goes for omissions. It's a little different kind of analysis, however. As to a misstatement, it doesn't have to be a material misstatement. It just has to be intentional.

As to an omission, the Court determined that in Kurland, that it had to be a material omission, something that would affect the judge's thinking in his probable cause determination, something if included in the affidavit as a factual allegation would affect the magistrate's thinking.

Well, we have several omissions. They also go to the side of misstatement, but they're omissions that, one, there wasn't any fear of fire concerned. That's an omission of clearly a material fact.

If the affiant had written a sentence in the affidavit, "I am not concerned that there's a fire hazard or an explosion problem, no hazard of these things at this location," I think the Court — well, would that have changed its thinking? Sure it would.

The reason he claimed to go down to the cabin was because he was concerned about a fire. If there is no concern for a fire — and that's stated in the affidavit — then the magistrate certainly is not going to look at fire hazard as a problem, which he very well may have and probably did, concerning all the statements by the officer about the volatile nature of ether and calling the fire department and keeping a deputy there to keep people out because of these things.

If after all that, or after excising of his statements, which is required even if they are not intentional — the excising calling the fire department and excising the concern for fire hazard and excising the omission that there was no concern for fire hazard, then there was no concern for the fire.

We have to get all the stuff for fire out of the warrant. A statement that there was no concern for a fire here, his own testimony. So then we are looking solely at the items discovered.

But again, we probably have to step backwards and say, well, what's he doing there anyway, then? What legal grounds does he have to be there? What — what brought him on the premises?

He had every intention of going to the premises from a phone call. Well, he wasn't expressly or implicitly invited, and the owner didn't have the legal right to do it anyway. And he admitted that.

No one told him to go up there. He didn't even tell the man he was going up there. But he was on his way because he knew there was a lab operation, and he was going to confirm it.

So we've got a confirmatory search problem, no fire problem. And we've got some kind of lab setup.

And again, what kind of lab? No one knew at the time. And today we know that it's a hundred to one that it was criminal — or that it was legal, I should say.

Again, in Kurland, the Court didn't say, add in the omissions if they're material. The Court said, if it's material, quash the warrant, period. It's over. No further discussion on the subject.

I think the Court has to find that's a material omission. I'm sure that anybody who read the affidavit for the first time said, well, he probably is going to get — that's probably going to be good because there's a fire away. There. He called the fire people right away.

We can't look at it that way today. We have to take all tht stuff out. And now we're looking at — you got a phone call. someone described something that sounded like a lab to him. So he went up to confirm it.

And there was no fire hazard, period. He didn't put that in the affidavit. It's clearly material.

Material is defined, under Penal Code Section — strike that. — under Kurland, 22 Cal. 3d at page 384:

> "Facts must be deemed material for this purpose if because of their inherent probative force, there is a substantial possibility they would have altered a reasonable magistrate's probable cause determination." And that's page 385. I'm sorry.

I think it's a very substantial possibility that the magistrate, reading an affidavit to the effect that there was something, some smell in the air, wasn't sure what it was, wasn't worried about a fire problem and didn't call fire officials — those kinds of statements which must be, if they're omissions, be included or inserted into the affidavit, is really going to change the magistrate's thinking.

I doubt that the warrant would have been issued if that kind of statement had been in there, unless of course the magistrate believed, like probably all of us did at the time — and that's not necessarily anybody's fault. But you — if something is not true, even though we've relied on it as being true, and we subsequently determine that, by golly, it's not true. We believed it was, but it's not. Well, are we going to say, well, because we thought we were right, this guy's Fourth Amendment rights aren't so important? I think the Fourth Amendment is much more precious than that.

We are not dealing with the Fourth Amendment issue for any particular individual today. We never are. And that's what the Court has always said. We are not taking care of Mr. Morton or Miss Quesada or anybody else involved in this case today. We're dealing with whether the Fourth Amendment has been complied with, whether there's probable cause, whether the People are still free from unreasonable searches and seizures and can be secure in their persons.

And the history of the Fourth Amendment tells us we needed it. And the cases that have been decided by the courts, all the way to the California and the United States Supreme Court, tell us we still need it.

Sometimes there's bad faith and sometimes there's ignorance and sometimes there's just a mistake. But if we don't have that protection, come to your house, my house, anybody's house, kick the door open in the middle of the night, and kill them with a heart attack and be in the wrong house. Happens all the time.

In fact, I have a news clipping service, the owners of which are in the audience —

THE COURT: Well, I don't want — I don't need any of that in the argument. I understand what we're talking about.

MR. SMITH: Okay.

THE COURT: We'll take an afternoon recess at this time.

MR. SMITH: All righty. Thank you, your Honor. And I do have more on omissions.

THE BAILIFF: Court is now in recess. (A recess was taken from 3:15 p.m. until 3:42 p.m.)

THE COURT: Okay, Mr. Smith.

MR. SMITH: Thank you, your Honor. I believe when we left off, I was discussing the area of omissions.

And again, with respect to omissions, if an omission is determined to be material — and I've defined material for the Court; in essence, something that might possible alter the magistrate's probable cause determination — then the warrant must be quashed.

But even if the magistrate finds there is an omission, but it's not material, then if it's — if it was a reasonable omission, do nothing. But if it's a negligent omission, then the court must add that to the statements in support of — or the affidavit in support of probable cause and reexamine the affidavit.

And I've discussed what I think to be a material omission. And that is that the affiant really didn't believe that there was a fire hazard at the time. And when putting that in the affidavit, that certainly should — or as the case — as Kurland says, at least creates a substantial possibility that that fact being included in the affidavit in support of the search warrant would have altered a reasonable magistrate's probable cause determination.

There's also another omission in the affidavit, and that was that the affiant needed to go down to the cabin and walk around the cabin and look through windows and so forth in order to remove any doubt as to where this alleged smell of ether was coming from.

Yet during his testimony during the preliminary examination, he testified that he didn't have any doubt as to the source. So that again, if that's included — I detected the smell of ether, or what I detemined to be ether, coming from the cabin — if that were put in the affidavit — and I was sure of where it was coming from, threw that in, too, because he said he was sure — then why did he have to go down to the cabin?

Well, I think it's pretty clear why he did, and the only reason he did it and the only reason he was there, he was there to confirm his suspicions, and the People did acknowledge that.

And I was surprised, but I appreciate the integrity of the prosecution

by admitting that. Because that is the duty of each officer of the court. And I don't think there's any way around that at this point. Cook precluded that, so you must excise from the affidavit all of the observations.

But that again, if that statement, that fact — that the affiant did not have any doubt; in fact, he was sure of the source — was included in the affidavit, then if the magistrate made his probable cause determination primarily upon what the affiant observed when he went down the stairwell, knocked on the front door and then walked around the deck of the house, these crates and other things that he described, crocks and laboratory equipment, he wouldn't be able to do that.

He'd have to question why the affiant went down there. And that was his reason for going down there to begin with, because he wanted to check out and confirm the source, among other things. The other things were that he was concerned about fire hazard.

We went through that. He really wasn't. He wasn't down there for that reason, and that's why that would have had to have affected the magistrate's determination. It that wasn't material, it's got to be negligent that he wouldn't inform the Court that he was sure.

But to remove any doubt, to later testify, sure, I was sure of the source, where it was coming from. And that's his exact words, "I was sure of the source," and I've quoted and cited from the reporter's transcript. It's got to make some difference. It's got to make some difference even if it's just added to the affidavit. Because we then have to say, what's he doing down there?

Just to sum up, with respect to the location, or the source of the ether, the statement in the affidavit that the affiant needed to be sure, when coupled with his later testimony, that he was sure — strike that. — that he needed to remove any doubt, and then coupled with his testimony that he was sure of the source really is two things. We have a misstatement and an omission. A misstatement that he wanted to remove any doubt, and an omission that he was sure.

If he was sure, then that misstatement is intentional. How could it be anything else? It's certainly not negligent. How would one negligently write something like that when he was sure? Doesn't make sense. And it's certainly not reasonable. It's not a reasonable kind of misstatement.

And as I sum this up, I think there's a whole picture of misstatements and omissions that — and I conclude my first portion of that section one, regarding omissions and misstatements, with all the information that I believe needs to be added or deleted from the warrant, depending on whether — from the affidavit, depending upon whether it is a misstatement or an omission. And suggest that that's the way the warrant should read.

But thus far, the warrant should read, the affiant smelled something when he exited the vehicle. Possibly. It wasn't ether.

That might have been a negligent kind of misstatement. In fact, that might have been reasonable, because he didn't know what he smelled. But then considering that he is to be an expert in this area, someone who claimed to know the smell, then maybe it isn't reasonable. I don't know. But he wanted to find out what the source was. He wanted to remove doubt. But he knew. He knew what the source was.

So we don't have that anymore. We don't have that information.

We have an admission by the People that the reason he was there was to walk known the stairs, go around the place, confirm his suspicions that there was a lab.

And from his telephone conversation with Mr. Marvich, he knew exactly where to go: down the stairs and around the back, because that's where all the goodies were, out on the deck and inside the house, with the screen door open, the same condition it was in two days prior.

And if in fact that was the last time anybody was up there, which we're not sure, then it clearly couldn't have been the smell of ether. Our expert says the smell would last for an hour.

So according to the testimony of Miss Franklin, it couldn't have been what she smelled either, because that was five and a half hours later when she was up there.

We have a man going down a stairway he doesn't have a right to be, making observations he doesn't have a right to make, and the People have acknowledged that. And Cook prohibits that.

We have an affidavit now that lawfully should not contain any of the observations made by the officer. So we can go on to see if there are any more to show the Court that if in fact there might be a crime taking place. I don't think there are.

A point, though, with respect to the law in the area of misstatements and omissions. A misstatement, in order to cause — or to justify and require the Court to quash the warrant and suppress evidence, must be intentional. An omission must be material.

As to an intentional misstatement, the question of deceiving the magistrate does come into play. As to an intentional omission or a material omission, that question does not come into play. If it's material, that's it.

I don't know why, and I've tried, I really have, to find a reason why the affiant would have told the court — or the magistrate via his affidavit that he had contacted fire officials.

The only thing I can come up with was he was trying to bolster the facts as to the fear of fire. That was something that was discussed in the prelim. And it was — preliminary hearing. It was used by the People as

a justification for the affiant and the other officer and individual who were with him to be there and to look around and conduct a, quote, investigation, which wasn't an investigation. It was a search.

And that makes sense to me why the affiant would do that, why he put that in there. Because that's what he was talking about.

Now, it took him, apparently, about five hours to get that affidavit put together and the warrant to Judge Press. And all of that was done up in Crestline.

He indicated in his affidavit that he had spoken with certain members of the select investigation unit with the Sheriff's Department about his reasons — what reasons, we don't know, but his reasons for believing that there was a clandestine laboratory operation for the manufacture of PCP or methamphetamine at the residence.

Maybe there was a lot of thinking and talking going on about what all these things meant and how to put it together and how to justify it.

Were I an officer of the law, I sure would have to think about it a long time and be very, very careful in putting together an affidavit in support of a warrant. Because that's one of the first things a defense attorney looks for, was the warrant good. I understand that, and I'm not saying or suggesting there's something wrong with that. But it looks as though that's what took place.

What are the kinds of things that we can say that are going to constitute probable cause? And we've got kind of in sections. We've got fire hazard; we've got laboratory discovery; and we've got the affiant's experience and discussions with other officers, which tell him it's a lab, for methamphetamine or PCP.

Well, fire hazard is out. It's not even in there anymore. That's clearly a misstatement. The information, the discussions about fire hazard, the need to call fire personnel — that in my opinion is grounds to quash the warrant.

And I have suggested that in my pleadings, and I do again. I think there's no way around it. He didn't do it. He testified later he didn't do it.

Defendant says the meaning of the of the affidavit is that the fire department was called when the detective returned to his car from checking the house and is, therefore, an intentional misstatement because the call was not in fact made then. The misstatement is said to be material because it was allegedly put into the affidavit to convince the magistrate that there was a fire hazard; additional cause to issue a search warrant. Regarding the fire hazard question, the failure to state in the affidavit that affiant did not in fact think there was a fire or explosive hazard is deemed to be a material omission.

FN 70

What affiant's purpose was in stating that the fire department was called I do not know, but it almost certainly was not to stampede the magistrate into issuing a search warrant before the house blew up and a conflagration ensued. If, in fact, such an emergency existed, the requirement of a search warrant would be excused. The inference (and that is all it is) in the affidavit that the fire department was called before the detective left the scene to get a search warrant is not demonstrably an intentional misstatement because it is not specific as to time in relation to other activities of the detective and because it is surplusage (why lie about something that is really immateriai?).

FN 71

The danger in the situation presented to the detective (affiant) was not the reason for the issuance of the search warrant. It was the reason why the officer went around the house trying to determine whether anybody was inside.

FN 72

Then, through the glass door he saw evidence of a drug laboratory and no evidence of anybody inside, and he withdrew to get a search warrant.

FN 73

So, the vagueness of the time when the fire department was called, if a misstatement at all, is innocent because not offered on the question of probable cause and immaterial to it.

FN 74

(McCORMICK:)

Q. Did you enter the cabin to do anything to prevent an explosion?
A. No, sir.
Q. Did you go inside the cabin to determine if there was a stove inside the cabin?
A. No, sir.
Q. You didn't go inside the cabin to determine if there was any type of gas mechanisms that were on, or had their pilot lights on?
A. That's correct.

Q. And you didn't attempt to shut off the gas valves to the cabin; did you?
A. No, sir.
Q. And after you left the back decking area, what was the first thing you did?
A. Returned to my vehicle.
Q. And when you returned to your vehicle, what did you do?
A. I called for a marked sheriff's unit to come to the location.
Q. Did you leave before that marked unit arrived?
A. No, sir.
Q. At that time, did you request for any fire units or anyone to alert the U.S. Forest Service, to have them come to the area?
A. No, sir.
Q. As a matter of fact, you didn't do anything to prevent a potential fire hazard?
A. At that time, I did not.
Q. How long did it take you to obtain the search warrant?
A. A matter of hours. I don't recall exactly when.

FN 75.

(MR. McCORMICK:)
Q. When did you return to the cabin?
A. To the best of my recollection, it was sometime around dusk.
Q. And that's in August?
A. Yes, sir.
Q. And it starts — dusk starts occurring around seven o'clock, seven-thirty?
A. Possibly.
Q. Is it fair to state that it took you approximately six hours, five, six hours to obtain a search warrant?
A. Possibly. I don't recall for sure how long.
Q. During that five or six-hour period, you didn't contact the fire department, U.S. Forest Service, or go back and try to do anything to prevent the hazardous situation?
A. I don't recall exactly what time the fire department was called. They were notified prior to my return, but I don't recall exactly when.
Q. But you went back to your office and started doing the paperwork to obtain the warrant first; is that not true?
A. Yes.
MR. McCORMICK: May I have a moment?
(BY MR. McCORMICK:) Did you notice the smell of any other

chemicals as you exited your vehicle?

A. I don't recall any.

## CROSS-EXAMINATION

BY MR. MORRISSEY:

Q. Do you go into these laboratories in similar situations to the one we're discussing here and try to turn off any appliances? I'm talking about as a matter of practice.

A. It would give — it would depend on a given set of circumstances. In any particular instance, I felt that if anything was on that would cause an explosion, it would have already exploded. The odor and the fumes were so strong. If there were a fire nearby, it would have already ignited.

Q. And I assume when you saw this evidence of a laboratory, that you intended to get a search warrant and then search the place; didn't you?

A. Yes, sir.

Q. And did that intent have anything to do with your not going into the house?

A. Yes, sir, it did.

Q. And what was that?

A. Based upon my observations that I could see through the undraped windows. The fact that I had not had anyone respond to any of my calling out, and that I could see no evidence of anyone being present. No vehicles, nothing to suggest anyone was present by that time, and the fact that I was in fear for my own safety, and the safety of the other officers present with me, I felt it best to freeze the scene, having an officer stay there present in the area with the marked unit, not allowing anyone else to come in or near the residence, and for myself to retreat and get a search warrant.

Q. Well, how come you didn't call the fire department at that time?

A. Once again, I wanted no one in or around the scene. I felt that if that particular residence were going to ignite or explode, it would have already done so due to the strong fumes, and such that were present. I, therefore, felt it was my duty at that time to prevent anything that would be likely to produce a spark or fumes to get in or near that residence, and that would not happen until anyone got close to it, and that would not happen until I returned.

Q. Do you, from time to time, call the fire department to actually go in and turn off appliances or not?

A. Yes, sir. As a matter of practice, we would call the fire department to come in and to remove the fumes with some type of evacuating equipment, and also under a given set of circumstances, I could conceive of myself going into a place where I felt that the possibility of an explosion was present, to turn off appliances. But that was not the case this time.

THE COURT: Mr. Morrissey?

MR. MORRISSEY: I have one further one.

RE-CROSS EXAMINATION

BY MR. MORRISSEY:

Q. When you were outside of there on your first arrival, did you know whether or not there was any gas in the place? Or do all those houses up there have gas?

A. I assumed there would be. I didn't know for a fact there was.

MR. MORRISSEY: That's all.

THE COURT: Anything further?

MR. McCORMICK: Nothing further.

THE COURT: Thank you. Any further witnesses?

MR. McCORMICK: I have no further witnesses, no.

THE COURT: Do you have any witnesses you'd like to call?

FN 81

Bottom line again, he was there because he suspected a clandestine laboratory operation, and I have come to interpret that term used by the affiant as being any illegal operation, and he wanted to check it out and make sure. So that's what he did. The People have admitted it. That's why he was there.

But the People have acknowledged that that was the reason for him to walk on the property, to confirm his suspicions. There's simply no way around; that is not permitted.

Because he believed from what Mr. Marvich told him that he discovered a lab. And he went up there to confirm it.

So he's there to confirm his own suspicions. And he's on private property, in what I consider a very private place, to confirm his suspicions. It wasn't as though he was off with one of the five houses we talked about. He wasn't on the highway looking down on the decking, because you can't see it from the highway. You can only see it from the back.

He had been told what was there.

Well, I think it's pretty clear why he did, and the only reason he did it and the only reason he was there, he was there to confirm his suspicions, and the People did ackowledge that.

And I was surprised, but I appreciate the integrity of the prosecution by admitting that. Because that is the duty of each officer of the court. And I don't think there's any way around that at this point. Cook precluded that, so you must excise from the affidavit all of the observations.

We have an admission by the People that the reason he was there was to walk down the stairs, go around the place, confirm his suspicions that there was a lab.

FN 83

We have a man going down a stairway he doesn't have a right to be, making observations he doesn't have a right to make, and the People have acknowledged that. And Cook prohibits that.

We have an affidavit now that lawfully should not contain any of the observations made by the officer. So we can go on to see if there are any more to show the Court that if in fact there might be a crime taking place. I don't think there are.

FN 88

Rucker went to the cabin because he suspected it contained a drug laboratory. Upon his arrival he could smell the ether out at the street and knew it must be strong inside. Ether being an anesthetic and volatile, it became important to find out whether anybody, conscious or not, was on the premises and, if so, to get them out. At that point safety was as important, if not more so, as investigation. When he got no answer at the front door, he took the most direct route to the back door: the sundeck which runs from the front door along the side of the cabin to the rear. It is a route that anyone would take who needed to contact the occupants and who got no answer at the front door. It is, therefore, an area in which the occupant has no reasonable expectation of privacy.

FN 89

Another reason the occupant of the cabin has no privacy in this case is that no such right exists in connection with what has been publicly exposed. Another of the cases discussed in *Lorenzana, People v. Berutko*, 71 Cal.2d 84, states at p. 93: "What a person knowingly exposed to the public, even in his own home or office, is not a subject of Fourth

Amendment protection." And *People v. Rice*, 10 Cal.Ap.3d 7329-740, states, "The act of smoking marijuana in a room with an open window is not an act done by a person exhibiting a reasonable expectation of privacy. The smell of marijuana would not be limited to the room or even the immediate yard of the house but could conceivably drift to adjoining premises." Similarly here, the use of ether to the extent and under circumstances that allow its smell to permeate the air out to the street imposes no privacy barrier to the performance of his duty by an officer who smells it and appreciates both its pertinence to drug laboratories and its danger. He may at least go around the property to check it out. Defendant cites a federal case to the point that the smell of ether is insufficient cause for a search warrant. That is beside the point. Probable cause is not necessary to get an investigation going. *People v. Monson*, 28 Cal.App.3d at 938-939.

To summarize, because the occupant broadcast the use of the ether, there is no right of privacy involved; and if there were, it would not exist in this case because the officer's route of travel was an area of common use and the situation was exigent.

FN 90

1) Even, for the sake of conversation, if it were to be assumed that the officer's conduct was illegal, it would be so arguably legal and so appropriate to common sense that his good faith belief in the propriety of what he was doing should be sufficient to legitimate his observations. See *People v. Newell*, 93 Cal.App.3d 38-39.

2) Were Rucker's observations at the cabin excised from the affidavit and a warrant sought on the basis of the observations of the homeowner (a reliable citizen-informant) corroborated by Rucker's smell of the ether and his expertise in its use in drug laboratories and in interpretation of the homeowner's information, there would still be probable cause. Citizen informants do not normally need corroboration for search warrant purposes. *People v. Schulle*, 51 Cal.App.3d 809, 814. In a case like this, however, corroboration in the sense of interpretation should be had in order to make sense of the homeowner's observations. See *People v. Johnson*, 21 Cal.App.3d 235, 242-246 for a somewhat analogous situation of information from a citizen informant providing the basis of an experienced officer's expert opinion so as to justify issuance of a search warrant.

FN 92

As we indicated in the proceedings with regard to the expectation of

privacy, I don't think there's much question about that with regard to the locale of the premises and what was happening there.

In the instant case, we have, again, what the Court has acknowledged is a pretty private area.

Q. So from a distance, it would be hard to see in there, wouldn't it? In fact, the photograph — you can't see anything in there, can you?
A. Not really, no, sir.
Q. Kind of like somebody designed it for privacy?
A. Yes, sir.
Q. And the decking around the residence has that kind of trimming around it all the way that there is decking, doesn't it?
A. Yes, sir.
Q. Well, you're a photographer by profession — or as part of your work?
A. Part of my work, that's right.

THE COURT: I don't think there's much in the issue of expectation of privacy. You can take that whole general mountain area, people like to get away from the world, enjoy their little day and sun away from the observations of the world. I don't think that's going to be seriously contested.

FN 93

V

ABSENT EXIGENT CIRCUMSTANCES, THE AFFIANT AND OTHER SHERIFF'S PERSONNEL WITH HIM HAD NO LAWFUL RIGHT TO BE ON THE SUBJECT PREMISES PRIOR TO POSSESSION OF A DULY EXECUTED SEARCH WARRANT.

*Lorenzana v. Superior Court*
9 Cal.3d 66 (1973)

During preliminary examination in April, 1981, the affiant testified that he had not been asked by the owner of the subject premises to go to the residence in question, and that he had not informed the owner that he was going to go to the subject premises. (R.T., April, p. 86, 8-14.) Based upon the same, the People are precluded from arguing that the affiant was expressly or implicitly invited onto the subject property by the owner, and clearly an issue remains as to whether the owner had that authority. In any event, the affiant was obviously aware that the subject

premises were rented, and did not seek permission to enter onto the subject property by the tenant, or party known to have rented the subject premises.

The question then remains, did the affiant violate the tenants reasonable privacy?

At the time of hearing on this Motion, the defendant intends to submit to this Honorable Court photographs of the subject residence which, this defendant believes, are worth a thousand words. Clearly, the subject residence is constructed in a fashion so as to insure the privacy of its residents. The only access to the subject residence is by way of stairway down to the front door, with a private walkway around the subject premises to the rear entrance. It is hereby contended that based upon the construction and design of the subject premises, a reasonable person would not believe that there is any access from the front of that premises to the rear of that premises that could be considered "public" in nature.

The court determined that if observations are made from a position to which an officer has not been expressly or implicitly invited, the intrusion is unlawful unless executed pursuant to a warrant or one of the established exceptions to the warrant requirement. (9 Cal.3d at 634.)

Cases decided prior to *Lorenzana* groped with the issue of how the court could determine when an officer had in fact invaded a defendant's right of privacy. In *People v. Willard*, 238 Cal.App.2d 292, (1965), the court dealt with a factual setting where there was both a trespass and a window search. In *Willard*, the court reviewed many prior decisions in which a trespass was factually involved, and concluded that those cases "articulate no clear rule and reach no conclusion as to the effect of a trespass on evidence thus obtained". (238 Cal.App.2d at 301.) The *Willard* court then attempted to formulate a rule, and stated:

> "We therefore reach this final conclusion: that looking through a window does not become an unreasonable search merely because a police officer may be on a defendant's premises when he makes the observation; *that the degree of privacy which the defendant enjoyed in the place involved is an important factor in determining the reasonableness of the search; and that essentially the determination of its reasonableness must depend upon the facts and circumstances of the particular case.*" (238 Cal.App.2d at 307) (Emphasis added.)

Subsequently, in *People v. Berutko*, 71 Cal.2d 84 (1969), the court again addressed the privacy issue when officers made observations through a window located at the front of the defendant's apartment, after surveilling the defendant's apartment based upon information from an informant that Berutko was dealing heroin. In *Berutko*, the court stated:

"Essential to the determination of reasonableness in cases wherein officers obtain probable cause for arrests through their own observations is a consideration of the degree of privacy which a defendant may reasonably expect in a given enclosure occupied by him." (71 Cal.2d at 93.)

In *People v. Edwards*, 71 Cal.2d, 1096 (1969), the court noted that in reviewing claims of unconstitutional searches or seizures from the grounds around a house, the courts have based their decisions on whether or not the place was a *constitutionally protected area*. The court then stated that "that phrase, however, does not serve as a solution in all cases involving such claims, and we believe that an appropriate test is whether a person has exhibited a reasonable expectation that has been violated by unreasonable governmental intrusion." (71 Cal.2d at 1100.) In *Edwards*, the court found that when officers, who entered the open area of the defendant's back yard and upon searching through a trash can, located two to three feet from the back porch door of the defendant's residence found marijuana, had violated the defendant's reasonable expectation of privacy and therefore found the proffered evidence to be inadmissible.

Subsequently, in *Cohen v. Superior Court*, 5 Cal.App.3d 429, the Court, upon addressing the same issue, determined that:

"The test to be applied in determining whether observation into a residence violates the Fourth Amendment is whether there has been an unreasonable invasion of the privacy of the occupants not to the extent of the trespass which was necessary to reach the observation point."
(5 Cal.App.3d at 434.)

In each of the cases discussed above, as well as in *Vickery v. Superior Court*, 10 Cal.App.3d 110 (1970), the Court not only addressed the issue of the defendant's reasonable expectation of privacy, but also recited the facts of the particular case as to whether the officers making the observations were lawfully entitled to be at the location where they made the subject observations. In *Vickery*, the Court found that the officers were entitled to be on the subject property because they were in pursuit of armed robbery suspects, and went to the rear of the subject residence to prevent the suspects from possibly fleeing through the rear of the residence when the other officers were approaching the front door.

The People allude to *People v. Rice*, 10 Cal.App. 3d at 739, wherein the Court discussed the act of smoking marijuana near an open window, thereby allowing the smell to exit the residence into the immediate yard and/or possibly the adjoining premises. The People then seek to liken

the smell of marijuana, clearly evidence of the use of contraband, to the smell of ether, stating that it "does not bar an officer who smells it and appreciates both its pertinence to drug laboratories and its danger to at least go around the property to check it out." Clearly, the smell of ether alone is not sufficient grounds to believe that a crime is taking place. As this defendant intends to show by way of expert testimony, ether is the most commonly used solvent in organic chemistry, and because it has several legitimate uses, its odor is not sufficiently distinctive to identify it with the manufacturing of Methamphetamines and/or PCP. In further support of his position, the defendant offers this Honorable Court a recent decision from the United States Court of Appeals for the Ninth Circuit, entitled *United States of American v. Charles Tate, et. al.*, a copy of which is attached hereto, marked Exhibit "B", and by this reference incorporated herein. Said case was decided on December 21, 1982, and, among the issues raised was whether the defendant's Fourth Amendment rights were violated when a Search Warrant was issued based upon an anonymous informer's allegation of a smell of ether at a certain residence, as well as confirmation of said smell by the affiant. In addressing this issue the Court stated on Page 6 of its written opinion, as attached hereto:

> "Appellants contend that the smell of a noncontraband sustance having a number of legitimate uses, standing alone does not establish probable cause to search a residence. We agree. Ether has many innocuous uses. It is a very common solvent, and is also used to start engines. While the strong smell of ether may be a factor in establishing probable cause, the government cites no case, and we have found none, holding that the smell of ether, *without more*, establishes probable cause to search."

Within its opinion, the court quotes *Johnson v. United States*, 333 U.S. 10 (1948) wherein the court held that the odor of opium was sufficient to establish probable cause to search. The court stated:

> "If the presence of odors is testified to before a magistrate and he finds the affiant qualified to know the odor, *and it is one sufficiently distinctive to identify a forbidden substance*, this court has never held such a basis insufficient to justify issuance of a Search Warrant."
> (333 U.S. at 13.)

Based upon the foregoing, plus defendants reference to the affiant's testimony that he did not fear that the ether allegedly emanating from the subject residence was a potential fire hazard, it becomes clear that the only reason the officers were on the subject premises was to further examine the premises based upon their belief that the smell of ether is somehow evidence of criminal conduct. The People's argument, as above-noted, seems to substantiate this point.

Although no ether was found on the subject premises, thereby challenging the factual veracity of the subject Warrant, assuming the affiant did in fact detect such an odor, or believed that he had detected such an odor, that alone, absent exigent circumstances, which clearly did not exist at the time, is not grounds to believe that a criminal act may be taking place, therefore justifying the affiant and officers present with him entering onto the subject premises.

Finally, it should become clear from the photographs of the subject premises, that the subject residence was constructed for the purpose of allowing a high degree of privacy to its occupants. It can furthermore reasonably be assumed that any party renting the subject premises would consider the obvious private nature of the residence as an important factor.

Based upon the foregoing, it becomes clear that the affiant and other sheriff's personnel had no lawful reason to be on the subject premises, and that their observations made while on the subject premises were the result of an unlawful invasion of the defendant's reasonable expectations of privacy, and therefore, the evidence seized pursuant to the Search Warrant issued based upon the probable cause established via the affiant's observations, must be excluded and suppressed, and the warrant quashed.

With respect to the issue raised in *Lorenzana*, whether observations made from a place where a person is not lawfully entitled to be, can be used as facts in an affidavit in support of a search warrant, clearly, the cases say they cannot. And the question, then, remains whether, under the circumstances of the given case, the area from which an observation was made, or even the area into which an observation was made, is a constitutionally protected area.

And I have covered most of the cases that deal on a fact-by-fact analysis as to whether an area is protected, examples being the officers in one case climbing up on a building and looking through the window of a motel in order to make some observations.

Another, which I think probably is — well, the other end of the spectrum is where officers, based upon some suspicions or hunches and wanting to confirm the same, walked into the backyard area of a residence and found a trash can about three feet from the back door of

the residence.

There was no fencing around the home. The officers dug through the trash can and found some evidence which they believe constituted evidence of a crime. And a prosecution resulted.

The Court found that this was a private area as well. I don't think necessarily the Court was determining that garbage is private, although oftentimes that case is cited for that proposition.

I think what the Court was really looking at is the area involved. If I put my trash out on the street, I think it's reasonable to assume, on trash day, that the trash men are coming to collect it, and I have given up any right to continue to possess that particular garbage.

If, however, it is up on my driveway, up against my house — and I don't know where everyone else keeps theirs, but I keep mine in front of my garage. If someone were to walk up to my front yard, assuming they could get past my dogs, and start digging in my trash can, which is up against my garage, I think the Court would be right and probably again would rule the same way. It is the area involved that a person is invading.

In the instant case, we have, again, what the Court has acknowledged is a pretty private area. And from the photographs introduced into evidence by the People, as well as the photographs into evidence by the defendant during the testimony of Dr. Sims, it is fairly evident that absent walking around the decking, as was done by the affiant in this case, the observations that were made, as outlined by the affiant in the affidavit, would not have been made.

The People's witness, Mr. Wyatt, testified that it would be possible, if you were a passenger in a car passing by, at some point to see the back deck area.

Assuming that's correct, and again assuming the facts that we have here of the — the observations made solely on the deck, not through the sliding glass door into the residence from the deck, but simply from the street or any kind of public place to look onto the deck, we don't really have anything that is even an indication of criminal conduct. Have some rubber gloves and some packing crates, a stirring rod, and that kind of thing. I believe a chemical bottle also. But I'm sure that an observation from an unprivate area, or public area, the street, for example, would not turn up much to anyone, including our expert, Dr. Sims.

Now, the question then becomes twofold, I think. One is, is that decking from, which an individual has to walk from the front door around to the back door, a private area? And we of course allege that it is. And I think the reasoning is very simple.

The affiant testified that when he arrived at the residence, he immediately smelled the strong odor of ether. This was up on the roadway.

And in order to be sure of the source — strike that. I think his words were "to remove doubt as to the source," and to look into the safety of others in or around the dwelling, he walked to the front door and knocked. And I believe his testimony was that he knocked and then he yelled. He again knocked and he yelled.

And receiving no answer, he made a determination to walk around the side deck to the back.

Well, assuming for the moment that there were exigent circumstances, I think that his behavior was reasonable, because he was concerned possibly for fire; he was concerned possibly for human life. And the constitutionally protected or private area clearly loses status at that point in time.

No one — no reasonable person would say, well, if there's a fire going on in the back house, you can't go back there. Or if you do, any observations you make are privileged and can't be used against the individual because this is a private area.

But again — and I discussed this at length during the last argument and as can be reviewed in the transcript — the question of whether there was any exigency seems to have been pretty well resolved by the People themselves, via their own witness. The affiant has testified long subsequent to the issuance of the search warrant based upon the affidavit that he did not feel that there were — was an exigent situation; that in fact, he was sure of the source, so there was no need to go and check the source. And he did not check the residence for any individuals, which if the ether was that strong, it might be a possibility that someone could be unconscious inside. It might be possible also that there would be a pilot light on a stove or some kind of an appliance that would ignite this volatile substance and cause an explosion.

But contrary to the allegations in the affidavit, the affiant testified that he knew that if there was going to be any fire and explosion, it would have already o[illegible]rred. And also that he did not enter the residence because he intended to get a search warrant.

Now, that intention I think is important for two reasons. First of all, if there were no exigent circumstances, then the affiant clearly would not be justified in going into the residence absent a search warrant.

Secondly, of course, the intention to go get a search warrant I think bolsters that argument itself. The testimony, I intended to get a search warrant, based upon the argument and the knowledge, I'm sure, by the affiant, that had there been some emergency, he could have gone in and checked. And that would be an exception to the requirement.

He bolstered our argument by saying, well, I wanted to go back and get a search warrant so that I could lawfully proceed into the residence.

So no attempt was made to look in there — none of the reasons stated

for going down and walking into this area that we would call a constitutionally protected area held mustard.

The source of the smell — he was sure of the source of the smell. The need to go in and look for someone who may be in or around the premises was never followed up. The concern for a fire was contradicted during testimony; That it would have already occurred, no reason to go in and check for appliances.

And in fact, the affiant also testified that he would be aware that he could make a call to the proper agency to have, I guess it would probably be called a vacuum system of sorts, to come in and draw out the fumes from the residence to eliminate any fire hazard.

And we also know that the fire department was not immediately contacted to assist. The fire department was not in fact contacted until approximately five and a half hours later.

So there was no exigency. And there was no reason to walk around there other than back to the Cook idea, to confirm his suspicions. And again, that has been acknowledged by the People. That was why the affiant went to the residence in question.

Now, we know that he went there to confirm his suspicions that there was a clandestine lab in operation, based upon what the owner of the property told him he saw two days prior.

I don't know whether there is an issue of staleness of the two days prior. However, one might wonder whether it's reasonable to assume, if there was a lab on August 1st, there was a lab on August 3rd.

But I don't think that's really an issue here. Because there's an acknowledgment, an admission that the purpose of the visit to that residence was to confirm his suspicions.

Well, the best way to confirm his suspicions is to follow the path that the owner of the property, who had no legal right to be there himself, followed. And I only suggest that because that doesn't necessarily take away from his observations. His observations are vague at best also.

He didn't suspect criminal activity and he didn't suggest that. His son told him after two days that maybe he should contact law enforcement because this might be something other than someone manufacturing plastic as the owner himself had thought.

He obviously wasn't that concerned about it, because he didn't call law enforcement for two days. He didn't make an issue of it for two days. And even when he did, he still repeated that he thought someone was manufacturing plastic in his house. And it kind of made him mad because it was a mess, and he was going to contact the realtor and have these people evicted.

Well, we're just totally away from an exigent situation. There was no emergency.

And the owner spoke with the affiant by telephone and told the affiant exactly what he did, how he approached the premises, how he walked around the decking because he got no answer at the front door. And he didn't stop because he smelled ether on the street. He stopped because he saw the lights on outside, and it upset him because he paid the utility bills.

When he got no answer to the door, he decided to walk around. And being the owner of the property, his curiosity got the best of him and he wanted to look inside, and he looked inside.

And as he got to the screen door covering the sliding glass door — and the sliding glass was apparently open — that's when he smelled this strong sweet smell. He didn't smell it on the highway or anywhere else.

And at no time did he think there was going to be an explosion or fire. He was just mad it was a mess.

So based on his observations and based on the statement of the People, that the affiant said he went to the residence to confirm his suspicions, then it is going to be logical that he follow the same path the owner did.

If he smelled stuff on the street, it's logical he would say, gee, too bad I can't get a warrant; I could go down there and check things out.

Okay, so maybe there wasn't sufficient grounds for probable cause for the issuance of a warrant, assuming the argument for a moment. However, that doesn't mean that the officer can't conduct an investigation.

Well, I beg to differ. An investigation wherein personal privacies are invaded requires probable cause, whether it's exigency, whether it's observation of some felony or criminal conduct taking palce, something that would justify the law going in under color of law and breaking one's close, breaking through this private area and looking further.

And I think I offered the suggestion last time, perhaps if it was someone's wife back on the sun deck sunbathing without her suit on, and maybe she had — and maybe she had one of these radios they wear on their hip these days with earphones, and she didn't hear anyone at the door. And she was entitled to her privacy back there, absent exigent circumstances. We clearly didn't have those.

I'm not making that up, and I'm not tearing apart the affidavit. The affidavit was torn apart by the testimony of the affiant: the contradictions of what took place, what really existed at the time.

So I challenge the People to come up with a good reason why the affiant even walked down to the premises.

Now, we're going to get back eventually to this argument of whether it was ether that was smelled clear up on the highway.

We have two witnesses, and basing one of the witnesses upon the

transcript of the preliminary hearing, the affiant in this particular warrant; and we also have Miss Franklin who testified that she smelled something up on the highway.

But the bottom line was, she didn't know what it was, and in fact, she probably doesn't know what ether smells like. But it probably could have been coming from anywhere. Maybe it's possible there was something up on that highway. But it's unlikely, according to our expert and in fact virtually impossible for that smell to have been there, an ether smell, absent ether being on the premises.

So again, we had then a law enforcement official who drove from the valley to the mountains to confirm his suspicions.

And did his suspicions justify him in going on to a property that was not his? He was not asked by the owner to do it. In fact, he didn't even tell the owner he was going to do it. That was his testimony as cited in my pleadings.

And upon arrival, going down based upon concern for ether, which is no longer there, and the location of its source, the concern for fire and the concern for others in there — all that's gone. He went down to confirm his suspicions. That's really what it has to boil down to.

Had there been a strong odor of ether up on the highway — whatever — there may have been a smell up there. And he may have wanted to smell it. And I think that this is probably the most unique case for evidence being offered, when the Court itself offered evidence that there was no ether in this courtroom but the Court smelled ether.

So I'm not suggesting necessarily that — I don't know what the inner workings of the affiant's mind were. The affiant may have thought he smelled ether because he thought he found a lab, and he wanted to find a lab.

And he didn't go up there to smell ether and nose around and see if maybe he could surveil the place. He went up there to walk down the stairs and walk around the deck and look in that place and see what was seen by the owner and see if he was right, if that was a lab.

The cases say you can't do that. You can't do that because it might be my yard; it might be your Honor's yard; and it might be information just as was given to the affiant.

That just isn't sufficient. It's not just for the sake of privacy alone. It's for safety, too. That's why we have a knock notice requirement. That's why we protect people from officers, based upon some uncorroborated information given by a, quote, reliable informant, whose reliability has never really been tested, coming in and kicking in doors.

I don't know what each and every individual in this courtroom would do, but I'm sure we'd get various reactions, some of them including violence, if our doors were kicked in the middle of the night without

being warned, just like we might get a violent reaction if our wife was on the sun deck tanning and all of a sudden a strange man was standing there or asking questions in an area that was considered private.

There's no showing there was any need for access by the public to that back portion of the house. There's no showing that there were water meters there, gas meters there, that there was any showing that public persons would come into that area.

Furthermore, again, the photographs submitted by the defense, as well as by the People, and the testimony of the People's witness, Deputy Wyatt, make it clear that from the rear of the residence, the observations up on that deck are minimal, if at all.

In fact, the railing around the deck is boarded, so there's a minimal view through it. The most a person might see if they went back and looked is they might get a glimpse of someone in a lounge chair if they were sunning. But the view of packing crates, et cetera, wouldn't tell anyone anything.

There's no location from the residence by which the items in the residence could be seen without invading one's privacy, without getting down and walking around the house.

Now, Lorenzana, it was kind of a — I would say an egregious violation of a person's privacy. The officer in that particular case had suspicions which subsequently were confirmed by an arrest.

But he climbed up and peered through a window where the window was open, and the blind was brought down to about one or two inches from the bottom of the window sill. And he stood there peering through and making observations and listening to telephone conversations and so forth, and used that for his probable cause. The Court said he had no right to be there.

This wasn't on a decking, where there's only one way in and one way out. This was between two houses. He walked up to the side of a person's home.

That's what we have here. Only I think even a more private situation.

The facts are in Lorenzana that the officer could have walked between the two properties without climbing over a fence to get in, without getting on a private walkway to walk in. It was simply the fact that he was there because he suspected something, and he was snooping. And he had no business being there. He wasn't expressly or implicitly invited onto the property.

And the case is the same here. There was no implicit invitation. It was known to the affiant at the time that the property was rented to someone other than the owner. Therefore, possession was not in the control of the owner. The affiant didn't know who had possession of the property.

I think subsequently, of course, it was discovered who had allegedly

rented the property. But there is yet to be any evidence in this case that I know of that will show conclusively who had possession.

But at the time, the affiant clearly knew the owner did not. There was an individual other than someone he had spoken with, and no one had given him consent.

Privacy is a real interesting concept in our constitutional framework. Courts have found privacy in many areas. And sometimes perhaps we all feel that it's been stretched a bit.

I think when we talk about a residential dwelling, privacy in a residential dwelling, probably — in and around it — is probably the most sacred privacy we have. That's the last resort, the last place we can go. It's not like we're walking around in a public street and the photographer is chasing us around like Jackie Onassis had. It's our last place.

That's why the rule was adopted, because the king's men used to kick in the door.

FN 96

> EVEN IF THE COURT DETERMINES THAT NOTHING MUST BE EXCISED FROM THE AFFIDAVIT, AND NOTHING MUST BE ADDED, AND EVEN IF THIS COURT DETERMINES THAT THE OBSERVATIONS OF THE AFFIANT WERE NOT THE RESULT OF AN UNLAWFUL CONFIRMATORY SEARCH OR THE RESULT OF AN UNLAWFUL INVASION OF THE DEFENDANTS REASONABLE EXPECTATION OF PRIVACY, THE AFFIDAVIT IN SUPPORT OF ISSUANCE OF THE CRESTLINE WARRANT DOES NOT ALLEGE FACTS SUFFICIENT TO CONSTITUTE PROBABLE CAUSE FOR ISSUANCE OF SAID WARRANT.

The People argue that the courts encourage the use of Search Warrants and that the Affidavits in Support thereof are to be read and interpreted in a common sense and realistic fashion rather than employing a hypertechnical approach. This defendant acknowledges this to be a state of the law, and submits that such authority does not preclude the requirement that the affiant to show that probable cause exists. Probable cause has been held to exist where "the facts and circumstances within ... (the officers') knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that a crime has been or is being

committed." *Theodore v Superior Court*, 8 Cal. 3d at 96.

Furthermore, the courts often make reference to the property to be seized at the place sought to be searched, and have delineated, via *People v Cook, supra*, that the test of probable cause for issuance of a Search Warrant is whether the Affidavit in Support of the Warrant states facts that make it substantially probable that there is specific property lawfully subject to seizure presently located in the particular place for which the Warrant is sought.

Furthermore, *Penal Code Sections 1524 and 1525* require that the warrant must establish probable cause, and that it must describe with particularity the property to be seized and the place to be searched. Section 1524 of the Penal Code delineates what properties may or may not be seized, with Section 1525 requiring specificity as to the items to be seized. Obviously, if the issuing magistrate makes a determination that there is probable cause, he then can authorize the search of the property described in the affidavit, as well as the seizure of the evidence specifically delineated in the affidavit, provided that the Affidavit in Support of the Warrant states facts that make it substantially probable that there is specific property lawfully subject to seizure presently located on the particular place for which the warrant is sought.

In *Beck v Ohio*, 379 U.S. 89 (1964) the United States Supreme Court, in examining probable cause, asked whether the magistrate, upon reading the Affidavit in Support of the Search Warrant, could reasonably infer the probability that specific things needed as evidence were located at the particular place to be searched. Again, the defendant stresses the requirement not only that the magistrate be presented with facts sufficient to warrant a man of reasonable caution in the belief that a crime has been or is being committed, but also that said magistrate be presented with sufficient facts to justify the inference that the specific property sought to be seized and/or needed as evidence is located at the particular place to be searched.

Privacy is a real interesting concept in our constitutional framework. Courts have found privacy in many areas. And sometimes perhaps we all feel that it's been stretched a bit.

I think when we talk about a residential dwelling, privacy in a residential dwelling, probably — in and around it — is probably the most sacred privacy we have. That's the last resort, the last place we can go. It's not like we're walking around in a public street and the photographer is chasing us around like Jackie Onassis had. It's our last place.

That's why the rule was adopted, because the king's man used to kick in the door.

And I'm not suggesting that the affiant in this case is the king's man.

I'm sure they're aware that the constitution provides for search warrant and/or probable cause at the time with an exception.

I'm suggesting that — saying the probable cause wasn't there. Had there been a lengthy surveillance, had there been some other situation, had there been a lot of facts, had there been a lot of things, it would be a different situation.

Those things don't exist. It was a find, maybe a lucky find. It wasn't where they worked up evidence for months and had people surveiled and had seen people come and go and sent an informant in to buy. It was just a lucky tip. The affiant played a hunch. Whether he was correct or not is not before the Court.

The question before the Court is whether he had more than that hunch to go on, whether he had facts that made it more probable than not that some criminal conduct was taking place.

And I suggested facts that would in essence provide a magistrate with an overview of what was seen; that it appeared to be a laboratory opertion for the synthesis of something unknown. What stage it was in was not known; what individuals were involved was not known. There were no facts alleged that showed A, B, and C are here, and therefore, we have this kind of operation.

And in fact, we have independent evidence, a witness who clearly is an expert in the area, telling us that from the facts given in the affidavit, it could have been many, many things. It could have been Dr. James Sims up doing one of his many experiments that he does. And in fact, he said it's not uncommon for him to do it in some hideaway place.

And the question is whether we're all properly informed as the public and whether law enforcement is properly informed, and whether the Court has been properly informed by affiant, whether the facts as stated to the Court by the affiant are sufficient to justify an invasion of a person's privacy, a right to go into someone's house and literally go through everything personal in that home.

And I won't argue that there are times that's justified. There certainly are. And the cases make it clear what's required.

But it's also very clear here that what's required isn't in existence in this affidavit.

The summation by the affiant is, I have discussed with, and he names three other fellow officers or detectives, my reasons for believing that there is now a clandestine laboratory in operation for the manufacture of methamphetamine or PCP at 24601 Lake Gregory Drive. Nowhere are those facts delineated, what they are, because he didn't know either.

Whether he was right or not, it doesn't matter. It could have been many, many things from what he saw.

I would submit to the Court at this point in time that perhaps the

People may want to submit argument with respect to all of Section 1 or simply to the issues of misstatements and omissions. But I find that the People are very hard pressed to come up with anything different.

In reading the transcripts of our proceedings prior to today's hearing, I noted that there was some discussion as to whether the People would bring in any witnesses, the affiant or the affiants in any of the affidavits, to testify or rebut what has gone on today.

The only testimony we've offered is that of an expert as to the properties of ether, as to what a lab might be, and whether anything in the affidavit indicated clearly, or more probably than not, that there was some criminal conduct taking palce. And I think that the undisputed evidence thus far is that the chances are a hundred to one in favor of legitimacy; that it's very common.

We hear about a lot of labs being raided. That may be because of a line of informants giving information about where this operation is taking place. That's good police work. Probably doesn't get out on the street when Dr. Sims is out there working on a new compound, because he doesn't talk to anybody about it and nobody is buying anything from him on the scene.

And before I get too far into that, the exclusionary rule is a really interesting concept, and it came about for one reason. The prosecution's side argued the fear of prosecution for perjury is sufficient to prevent officers from perjuring themselves.

The court said, well, we don't go for that. As Justice Cordoza said in 1926 — and I am now interpreting what he said, but his direct interpretation is "the criminal must go free because the constable blundered."

What he's telling us is it doesn't matter who you have before you. If you don't have probable cause, you don't have it. And it's not the fault of the Constitution or of the Court or of the defendant. If you don't have probable cause, you don't have it. You didn't have sufficient facts. A lengthy investigation.

FN 97

## B. AFFIANT'S OBSERVATIONS

The affiant alleges that upon arriving at the subject premises he smelled ether, and that upon approaching the premises and going to the rear of the subject premises the smell of ether was stronger, that he observed packing crates and stirring rods and rubber gloves, and saw chemicals, and various items of laboratory equipment.

Secondly, the affiant alleged that he had certain concerns with regard

to the volatile nature of ether, and therefore contacted a patrol unit to secure the area, as well as contacting other sheriff's office personnel and the fire department.

Thirdly, the affiant alleged his expertise with regard to his training in vice and narcotics and clandestine laboratory operations. Within this category of "affiant's expertise" the affiant makes a statement, which this defendant alleged is in the nature of not only conclusory language, but routinely used by most officers seeking Search Warrants for the search of properties allegedly used for the purpose of illicitly manufacturing narcotics, to the effect that it has been the affiant's experience that persons involved in the manufacture or possession of narcotics often hide the substances in their home or on their persons or in their vehicles away from the actual laboratory operation. Inquiry should be made here as to the relevancy of this paragraph, and this suspicion of the guilt of the accused. *People v Govea*, 235 Cal. App. 2d 285, 296 (1965). In *Govea*, the court determined that the warrant can be upset only if the affidavit fails as a matter of law to set forth sufficient competent evidence supportive of the magistrate's finding of probable cause, since it is the function of the trier of fact, and not the reviewing court, to appraise and weigh evidence when presented by affidavit as well as when presented by oral testimony. (235 Cap. App. 2d at 297.)

In the instant case, it then becomes necessary to delineate the facts alleged by the affiant in support of a determination of probable cause for issuance of the subject warrant. For purposes of discussion herein, the facts alleged in the subject Affidavit will be broken down into the citizen informant's observations and the affiant's observations.

The citizen informant contacted by the affiant related that he had driven by the residence at 24601 Lake Gregory Drive in Crestline, California on August 1, 1981. He further related that he noted that the outside lights were on at the residence and decided to inform the tenants of his desire to have them turn them off because he was paying the utility bills. The citizen informant further related that he noted that the screen door was removed from the front door, and thought possibly there might have been a burglary. Finally, the citizen informant related to the affiant that he walked to the rear of the subject premises where he noted certain packing crates and utensils apparently used in some chemical or laboratory work, and viewed the interior of the defendant asks the defendant asks the court to pay particular attention to this paragraph inasmuch as it will be discussed further with regard to the Search Warrants issued for the 28th Street home of the defendant.

Finally, the affiant alleged that he had reviewed with three other narcotics officers his reasons for believing that there "is now a clandestine laboratory operation located at the subject residence."

In reviewing the above, it is clear that the owner of the subject premises, described as the citizen informant, stated nothing which would clearly indicate some criminal conduct. Therefore, it appears as though the affiant then deemed it necessary to drive to the subject residence for purposes of making further determination whether some criminal conduct was taking place. It is noted here that it is clear that the affiant suspected a clandestine laboratory operation was taking place at the subject residence, and refers to a more thorough delineation of the same, *supra*.

The observations of the officer with regard to the chemicals and laboratory equipment he observed, without more, certainly do not "warrant a man of reasonable caution in the belief that a crime has been or is being committed." On the contrary, the reader must await a further analysis of the officer's findings in order to be justified in even suspecting that criminal activity is taking place. What else does the affiant offer?

By way of thorough reading of the remaining portions of the subject Affidavit, the only information provided to the magistrate for purposes of determining whether some criminal activity may have been committed or is being committed at the subject residence, the affiant simply stated that he had reviewed, with other narcotics officers, his reasons for believing that a clandestine laboratory was located at the subject residence. Nowhere in his affidavit did the affiant explain why he believed that there was such an operation, nor what his reasons were for believing the same. Clearly, it would seem necessary that because the magistrate was relying on the information provided him by the affiant, and there is no known transcribed testimony pursuant to the taking of testimony as permitted by *Penal Code Section 1526* in addition to the affidavit and application for the Search Warrant, and thus one wonders what it was that the magistrate read that led him to believe that a crime had been or was being committed at the residence to be searched, *Theodore v Superior Court, supra*.

Had the affiant specified what he had seen with some detail as to the kinds of chemicals he had seen, the kinds of equipment he had seen, and how those specific items are necessarily used for the manufacture of Methamphetamines, and not some other legitimate purpose, and that he had had confirmation of this belief by other narcotics officers, the magistrate may have been warranted in believing that a crime had been or was being committed at the subject premises. However, nowhere in the affidavit is such information found nor is such reasoning employed.

(MR. McCORMICK:)

Q. And you didn't attempt to shut off the gas valves to the cabin; did you?

A. No, sir.
Q. And after you left the back decking area, what was the first thing you did?
A. Returned to my vehicle.
Q. And when you returned to your vehicle, what did you do?
A. I called for a marked sheriff's unit to come to the location.
Q. Did you leave before that marked unit arrived?
A. No, sir.
Q. At that time, did you request for any fire units or anyone to alert the U.S. Forest Service, to have them come to the area?
A. No, sir.
Q. A laboratory that was in the process of manufacturing something?
A. Yes, sir.
Q. And in what stage of the process of manufacturing something?
A. I had no idea.

FN 109

Q. Were you able to, by standing outside looking in, were you able to observe the whole process that's involved in that type of a laboratory?
A. No, sir.
Q. Did you know if the process had reached a highly volatile situation?
A. I felt that it had, yes, sir.
Q. Did you enter the cabin to do anything to prevent an explosion?
A. No, sir.
Q. Did you go inside the cabin to determine if there was a stove inside the cabin?
A. No, sir.
Q. You didn't go inside the cabin to determine if there was any type of gas mechanisms that were on, or had their pilot lights on?
A. That's correct.

FN 110

Then, through the glass door he saw evidence of a drug laboratory and no evidence of anybody inside, and he withdrew to get a search warrant.

FN 111

He says he believes it is a laboratory and that he reviewed his reasons with other officers. His stated training and experience qualifies him to give an opinion, especially within the context of probable cause, which is all that is required. (That there may be room for doubt does not preclude a finding of probable cause.)

FN 112

That a person verifies his opinion with others similarly qualified is commendable and does not suggest either logically or experientially that he does not have an opinion. If anything, the magistrate could place even more reliance on a verified opinion.

FN 113

Nor does the fact that when he looked in through the open door and saw what he thought was a drug laboratory in the process of manufacturing (Tr. pp. 117-118) but was unable to either determine at what stage the process was or to see the whole process involved in a laboratory (whatever that means), means that he doubted it was a laboratory.

FN 114

"When police have a plain view of contraband from a portion of the premises as to which the occupant has exhibited no reasonable expectation of privacy, there is no search in the constitutional sense."

FN 115

"Similarly here, the use of ether to the extent and under circumstances that allow its smell to permeate the air out to the street imposes no privacy barrier to the performance of his duty by an officer who smells it and appreciates both its pertinence to drug laboratories and its danger.

2) Were Rucker's observations at the cabin excised from the affidavit and a warrant sought on the basis of the observations of the homeowner (a reliable citizen-informant) corroborated by Rucker's smell of the ether and his expertise in its use in drug laboratories and in interpretation of the homeowner's information, there would still be probable cause.

**FN 116**

From the fact that affiant listed and asked to search for the chemicals used in the making of both methamphetamine and PCP, it may be that from the porch he could not see the chemicals and/or labels he was observing well enough to determine whether they were appropriate to one drug or the other. Yet he could know from his experience that it was one or the other. (Cf. *People v. Howell*, 30 Cal.App.3d 228, 232-235.)

**FN 117**

That a place appeared to be a laboratory is a conclusion many an even untrained person could reach from what he saw or what was described in this affidavit even though he could neither describe nor fully understand a description of the various chemicals and apparatus seen. Then when one with sufficient training (he does not have to be an expert: *Wimberly v. Superior Court*, 16 Cal.3d at 565) to form an opinion does so and says what kind of a laboratory it is, a magistrate can reasonably believe him. Indeed, even without the benefit of a trained opinion, it would be reasonable to conclude that a vacation rental suddenly turned into a laboratory is probably manufacturing some illegal drug. (Cf. the reference to *People v. Kilvington* in *People v. Howell, supra*, 30 Cal.App.3d at 234-235.) It seems clear, then, that the magistrate could have reasonably concluded that the affidavit provided probable cause.

**FN 119**

(MR. SMITH:)

Q. If a student indicated some kind of interest that's beyond the scope of classroom involvement and came up and gave you a list of lab equipment identical to that in the return to the search warrant, would you from that list be able to determine that they were manufacturing or seeking to synthesize something illicit?

A. No, I wouldn't. ...

Q. There is nothing in that return that would indicate to you that someone was synthesizing something illegal?

A. No, not at all.

Q. Could that equipment be used for many kinds of experiments or processing or synthesizing?

A. Yeah, the most the common thing that I'm familiar with that people who are at home — home laboratories that I'm familiar with. other than illicit things, are to manufacture polymers or synthesize polymers; to synthesize detergents or soaps; to synthesize cleaning solvents, things like that.

There are a lot of different things that people do at home, mainly because they're interested in possibly patenting a process, and so they will do them at home away from the laboratory.

Q. Kind of in secret?

A. Yes.

Q. Are you acquainted, personally acquainted, with anyone who has synthesize something they've had patented?

A. I know people who have patents. I don't know anybody who is involved in their home lab with patenting, but there's always hope.

Q. Do some of — some of those folks generally do that in secret, not discuss their project until they have results?

A. Usually, they don't discuss it with anybody; the details of it, anyway.

Q. What in that return to the search warrant could have caused an odor of ether?

A. I didn't see anything, personally. I was curious as to the warrants; what they actually were looking for. What the listing was, was exactly correct and I didn't see any of that found, so I was curious. There was no ether there.

FN 120

Q. BY MR. SMITH: Dr. Sims, have you during your teaching and research exploring the field of organic chemistry used ether yourself in "synthesis," as you call it?

A. Yes, we use it. It's a common solvent. I mean, it dissolves a lot of different organic chemicals and so we use it as a vehicle; something to carry the compounds that we work with, to dissolve and put them in solutions.

Q. You refer to it as a solvent. Is that different from being an ingredient in the synthesis of something?

A. Yes. Usually it doesn't mean it takes part in the synthesis, not part of it; something we use to assist the synthesis, to put everything into.

Many organic compounds are solids or liquids and in order to mix them up well we dissolve them in the same solvents, so they're all in one homogeneous mixture, and so when we use the term "solvent," we mean to bring things into some homogeneous mixture and the solvent aids that, usually.

Q. In breaking it down from a more solid state?

A. Yeah. You take up, say, a white powder and dissolve it in a solvent like ether and you get a clear solution.

Q. I see.

A. Everything is homogeneous.

Q. Speaking of white powders, let's assume that I wanted to make some white matter, some methamphetamine. Would I necessarily have to use ether in that synthesis?

A. No, you wouldn't necessarily have to use ether. You could use ether.

Q. I could. So it's possible to manufacture methamphetamine without using ether?

A. Yes.

Q. Were I to use ether, would it be used as an ingredient in making this methamphetamine, or would it be used as a solvent, as you have described?

A. It's a solvent. It wouldn't be a necessary part of the chemical you're trying to make. You could use it to aid in the synthesis, to aid in the manufacture.

Q. I see. Are you aware of any occasion — I want to say "synthesizing." Is that improper?

A. No, synthesizing is fine.

Q. When synthesizing some compounds that ether would in fact would be an ingredient, rather than a solvent?

A. You can — you can do summetry to ether, is what, I guess, what you're asking. You can make ether react with things and change it into something else. When you do that, it's no longer ether; becomes a different thing.

Q. Would it smell differently?

A. Normally, you expect it to. When you change the compound, it changes elements.

Q. I assumed something a moment ago. Are you familiar with the chemical compounds and structuring and what would be required to manufacture methamphetamine?

A. I've read the paper on methamphetamine, yes. I understand how to make it. I've never done it, yet.

Q. Were you to choose to do so, obviously for experimental purposes, would it be a relatively simple task for you to, with the

necessary chemicals brought to you at your direction, manufacture methamphetamine?

A. Yes, it looks like a rather simple procedure to prepare. It could be an experiment that a normal sop[illegible] more student in organic chemistry could carry out with direction.

Q. So it's not really a sophisticated technique?

A. Not particularly, no.

Q. How about PCP? Are you familiar with PCP, often called angel dust?

A. Yes.

Q. Are you familiar with the chemical nature of it, also?

A. Yes, I am.

Q. What is required to synthesize it?

A. Yes.

FN 121

(DR. SIMS:) . . .

Those kinds of — there's a number of solvents that are common in a laboratory.

FN 122

Q. All right. Dr. Sims, did you at my request read and review the affidavit in support of the search warrant, the search warrant, and the return to the search warrant for the August 3rd, 1981, search of the residence located at 24601 Lake Gregory Drive?

A. Yes, I did.

Q. And during the course of your review, did you note, particularly in the return to the search warrant, the equipment listed in the return?

A. Yes.

Q. I see. Would there — were any of the items listed in that return items that would tell you what someone might be using them for, what — some specific synthesis or synthesizing process?

A. No, it looked like it could have been either some kind of scientific operation — but it's hard to tell what.

Q. Have you ever done any kind of lab work at home?

A. I've done a little bit of things at home. I don't do it very often, but I've known a lot of people who do work at home, yeah.

Q. If a student indicated some kind of interest that's beyond the scope of classroom involvement and came up and gave you a list of lab equipment identical to that in the return to the search

warrant, would you from that list be able to determine that they were manufacturing or seeking to synthesize something illicit?

A. No, I wouldn't.

Q. There is nothing in that return that would indicate to you that someone was synthesizing something illegal?

A. No, not at all.

Q. Could that equipment be used for many kinds of experiments or processing or synthesizing?

A. Yeah, the most the common things that I'm familiar with that people who are at home — home laboratories that I'm familiar with, other than illicit things, are to manufacture polymers or synthesize polymers; to synthesize detergents or soaps; to synthesize cleaning solvents. things like that.

There are a lot of different things that people do at home, mainly because they're interested in possibly patenting a process, and so they will do them at home away from the laboratory.

Q. Kind of in secret?

A. Yes . . .

Q. Are you acquainted, personally acquainted, with anyone who has synthesize something they've had patented?

A. I know people who have patents. I don't know anybody who is involved in their home lab with patenting, but there's always hope.

Q. Do some of — some of those folks generally do that in secret, not discuss their project until they have results?

A. Usually, they don't discuss it with anybody; the details of it, anyway.

Q. Well, if you with your background and experience were to come upon a cabin that appeared to have some type of la'oratory in it, would you be shocked and feel that maybe — or would you think "Maybe this guy's a chemist making some perfume or soap"?

A. I suppose I'd be curious to find out what he was doing.

Q. Let's assume for the moment that you came upon what you thought might be a laboratory operation — we'll leave out the word "clandestine" because I'm not sure what that means anymore — in a private dwelling and you were able to view the operation as described by the affiant in the affidavit in support of the search warrant.

From what you've read and from what the affiant viewed, would it be obvious to you as a professor of organic chemistry that some specific thing is being manufactured?

A. No, it would be, for me, very difficult unless I saw the chemicals actually and were able to identify them, at least to be able to read the labels on the things that were there; and as I understand it, this was all done from outside a building some —

Q. That's the way I read it, also.

If you approached such a residence and smelled ether, would that indicate to you that some specific thing is being synthesized?

A. Not really. It would be common in any laboratory to find ether. It's one of the — I don't think I would ever go into a laboratory and not find ether of any kind. The people working with organic compounds; you're going to use ether. It's one of the four or five common solvents that I mentioned before.

FN 124

Q. Have you had an opportunity to read literature that might indicate to you what are some of the uses of ether and maybe the number of common uses of ether?

A. Yes, I went to — just for my own curiosity — went to a chemical abstract, which is a literature source for original literature and looked up — looked up the common uses of ether.

Q. I see. If I wanted to find out the common uses of ether, I would be able to go to this chemical abstract and as a person in the field of chemistry that would be what I'd go to?

A. Yes, that's the first reference source you'd go to, usually.

Q. And I would go and look under the name?

A. It's called ethane, one, one dioxy-base.

Q. I'd know that?

A. There's a technical term for it, yes.

Q. And having reviewed the chemical abstract, did you come to some conclusion as to maybe a round figure as to the number of uses, common uses, of ether?

A. I would guess that there's, commonly described — this was for a 10-year period — references to literature where ether was used and there was something on the order of 100, 150 uses, I think.

Q. Do you recall any of those uses?

Well, was there reference made to synthesizing illicit narcotics, for example?

A. No.

Q. So all of these references were to some legal use or —

A. Yes.

Q. Yes, and each time was that a solvent capacity?

A. Most of the time in a solvent capacity.

Q. What might some of those uses have been?

A. The first one, anesthesia, is probably the biggest use; veterinary anesthesia and human anesthesia. People use it for strange things. People will sniff ether. During prohibition, ether was used and alcohol wasn't, and the body can metabolize it the same way.

Q. Regarding the availability of ether, have you been — gone to a chemical supply and purchased ether over the counter?

A. No.

Q. Can that be done, do you know?

A. I guess it can; I don't know. We buy it through a purchasing agency of the university, so I have no experience buying it outside. People do buy it outside. I've never seen it for sale. I've never been to one of these supply houses myself.

Q. Isn't one of the uses of ether also to assist in starting motors, engines?

A. Actually, you can buy ether in cans in something like Gemco for spraying into a diesel engine, usually. I have a diesel car, and I've used that a few times on cold mornings.

Q. That's not usually the type of bottle that you buy it in?

A. Not the normal kind of package, no, but for contractors, they use ether in cans. Sometimes they buy the same kind of cans we buy in the laboratory.

Q. Is that the same ether that you use in the laboratory?

A. Sure, it's the same ether.

Q. So it would essentially start the same?

A. Start the same. Usually starts an engine in the mornings, diesel engines of all kinds.

Q. Don't some people use the ether to mix with gasoline, add to gasoline, to increase its combustive ability?

A. Yes, ether is sometimes used to make gasoline — again, to start an engine on a cold morning you add ether to the gasoline, sometimes.

Q. Ether is also used in woodworking, isn't it, to assist dyes in penetrating the wood?

A. Yes, it's a common solvent for dyes and it can be used to help penetrate whatever they're dying.

Q. If I were to get something electroplated, might I use ether in that, also?

A. You could use ether in electroplating, yes, to dissolve the stuff that you're putting on.

Q. How about if I wanted to make soap?

A. Soap is a general term for things, including detergents, and many detergents are made with ether and if you were mixing different

kinds of detergents to make a particular kind of soap or detergent, then you might use ether, sure.

Q. If per chance I wanted to compete with Tide and some of the others, it wouldn't be uncommon to hear of some guy hiding himself away to work on his formula?

A. No, that's very common.

Q. And most of the items listed in the return for the search warrant are items that you could readily acquire?

A. Yes.

Q. In fact, did you note anything there that you couldn't easily acquire?

A. I didn't see anything that seemed so unusual, no.

Q. And, again, it's your opinion or your testimony that based upon the reading of the affidavit in support of the search warrant, you could not personally have made a determination of what was being manufactured?

A. Not based on what I read, no.

Q. You said something about polymers. What is a polymer?

A. All plastics are polymers. Plastics — and nowadays many things are plastic.

Q. Would ether be used in synthesizing some plastics or polymers?

A. Sure, ether is. Again, they are organic compounds. It's a good organic solvent, and you might find it used there.

The people who put together surfboards use ether in solvents. They use polymers as the core of the surfboards. They would use ether to dissolve those organic compounds.

Q. So it would not be uncommon to smell ether coming out of a surfboard manufacturing shop?

A. Ether, acetone, methylacetate; all three of those.

FN 125

It would appear to the Court and the Court would find that in fact there were exigent circumstances at the time to make further investigation that there was a furtherance of investigation and not a violation of the reasonable expectation of privacy to — not a confirmatory search to get down into that property area, and then make the observations which were made and which obviously would support the warrant.

FN 128

The facts alleged by the affiant in his Affidavit in Support of the subject Search Warrant can be outlined as follows:

A. That on August 3, 1981, the affiant assisted Detective Rucker in the service of a Search Warrant on the residence located at 24601 Lake Gregory Drive in Crestline, California (being the same warrant as described in defendant's pleadings *supra*;)

B. That pursuant to the search of the Crestline residence, a clandestine laboratory was found along with books, heaters, narcotic formula notations, filter and filter papers and other items used in a clandestine laboratory;

C. That upon further investigation the affiant discovered that the subject Lake Gregory residence had been rented to the defendant herein and that the address on the rent receipt was made to the defendant whose address was 1799 West 28th Street, San Bernardino;

D. That the name and address of the renter was verified by Detective Rucker on August 3, 1981 as being the defendant herein and that he had given the same address as listed above, as well as his driver's license number;

E. The affiant then alleged that he ran a record's check on the defendant herein and that said check revealed that the defendant's address was 1799 West 28th Street, San Bernardino, California and that his driver's license number was the same as above-described.

F. That certain papers were found at the subject address revealing the names of STEVEN GOODE and CANDACE CORNELL;

G. A further search revealed a rent receipt for a residence located at 19330 Sagebrush Trails in Desert Hot Springs;

H. The affiant alleges that he spoke with a detective from the Riverside County Sheriff's Office who informed him that on June 25, 1981 he had served a Search Warrant on the Sagebrush Trails address and found a clandestine laboratory within the residence;

I. Further, the Riverside detective related that he had found papers inside the Sagebrush Trails residence with the names CANDACE CORNELL and STEVEN GOODE on them;

J. The Riverside County Sheriff's Detective further informed the affiant that he had spoken with the owner of the Sagebrush Trails residence and that he had informed the Riverside detective that he had rented the subject residence to a STEVEN GOODE who informed him that he didn't want anyone near the residence while he was there;

K. The Riverside detective also informed the affiant that the owner

had stated that there was a white 1974 Cadillac bearing a certain license number, and that when the Riverside detective ran a record's check on the license number it came back to a CANDACE CORNELL;

L. The Riverside detective further informed the affiant that during the course of the search of the subject residence he found a purple-type liquid powdery substance in a glass flask;

M. The affiant alleged that this same liquid and powder-type purple substance was similar to a substance that the affiant found at the Lake Gregory Drive residence on Monday, August 3, 1981 and

N. The affiant alleged that the criminalist from the San Bernardino County Sheriff's Crime Lab told the affiant that the substance above-described was a red phosphorus associated with the manufacture of MDA (Methamphetamines).

Appellants argue that the court's finding was erroneous, and that a careful reading of the facts alleged in the Affidavit in Support of the Search Warrant for the August 4, 1981, search of the 28th Street residence clearly shows that those facts, when combined, were insufficient to establish probable cause, as a matter of law. On the contrary, Appellants argued that it would be equally likely that the situation would arise wherein an individual using a forged document or a false birth certificate gave an address of a local judge or justice, which, when officers seeking a Search Warrant alleged their address as the address of the property to be searched and this was found to be sufficient, an interesting situation would certainly arise when those same officers, in possession of a duly issued Search Warrant, came upon an irate judge or justice who suggested that they should have done a more thorough investigation prior to seeking issuance of the warrant. In the instant case, there was no prior investigation, only the findings at the Crestline residence, the previous day, and stale information regarding individuals not known to be involved with (your petitioner).

FN 129

MR. SMITH: I think I already have.

THE COURT: Yes.

Okay, Mr. Smith.

MR. SMITH: Thank you, your Honor. Section 2 in the defendant's motion deals with the search warrant issued for the search of the residence located at 1799 West 28th Street in San Bernardino on August 4th, 1981. This was the day after the search at the cabin.

Initially a review of the facts alleged for probable cause for issuance

of the warrant to search this particular residence shows numerous facts that are just totally irrelevant as to who might live at 1799 West 28th Street, what particular criminal conduct may be taking place, and what items might be found there.

Specifically, the affiant gives a little bit of a background and alleges that he assisted in the service of the August 3rd search warrant at 24601 Lake Gregory Drive and that there was an alleged clandestine laboratory found and certain formulas and so forth; and that probably is the most relevant thing with respect to Defendant Morton and to the search of the 28th Street address was that it appeared as though there was a rent receipt made to the defendant showing his address to be at 1799 West 28th Street. And that that was verified by the party who rented the premises.

Then also the affiant alleged that he ran a records check through the Department of Motor Vehicles and came back with the same address as that listed, 1799 West 28th Street.

Then the items following that, there were certain papers found with respect — revealing the names of Steven Goode and Candace Cornell.

Can't see how that has anything to do with 1799 West 28th Street, that there was a rent receipt found at — this reference is made to what was found in the cabin in Crestline the day before: The addresses of Steven Goode and Candace Cornell, a rent receipt for a residence at Sagebrush Trails in Desert Hot Springs, a conversation with a detective from Riverside County who claimed that a search warrant was served on that same Sagebrush Trails address and an alleged clandestine laboratory was found.

At this point, I would note for the record that it has been stipulated, I believe, by the parties that the Riverside Sheriff's Department for some reason I think was housekeeping, and in less than 30 days after the seizure of these items at Sagebrush Trails, disposed of them. And clearly, there's no ability on the part of the defense in any way to examine those items and challenge whether they exist or whether they're in any way relevant to the conduct of a laboratory. And I think under People versus Hitch, they should be excluded from the warrant — or from the affidavit.

Again, the affiant alleged that after discussing this matter with — of the Sagebrush Trails search with someone from the Riverside County Sheriff's Department, that he also found papers inside the Sagebrush Trails residence that had the names of Candace Cornell and Steven Goode on it.

Again, I don't see how that's in any way tied to the defendant here.

The next allegation was to the effect that the detective from Riverside County informed the affiant that Steven Goode had been the person

who rented the Sagebrush Trails residence, which again takes all this information even further away from the defendant here.

There is then reference made to information given by the Riverside County sheriff's detective about a Cadillac bearing a certain license number, and that it was registered to Candace Cornell.

Again, it's irrelevant to what was happening on the 28th Street that there was also some purple type liquid powdery substance. I don't know what that means, but it was some kind of substance found in Riverside at the Sagebrush Trails residence, and that the affiant alleged that a similar type of substance was found in Crestline.

Again, neither of those items take us anywhere near 28th Street thus far.

The affiant then alleged that he had discussed this red — or purplely, liquidy, powdery type substance with a criminalist from the sheriff's crime lab here in San Bernardino and that it was a red phosphorus associated with the manufacture of MDA, or methamphetamines.

Okay, that's fine so far. But still, I don't see how any of these things so far are relevant to the 28th Street other than a rental receipt — rent receipt and address of a driver's license showing the defendant resided on 28th Street.

So far the Court is fair in assuming that the defendant may live at 1799 West 28th Street.

The affiant then specified items seized at the Crestline cabin were items that are generally used in the manufacture of methamphetamine, and described his expertise.

Then —

THE COURT: Well, wait a minute. He doesn't say he picked those up at Crestline, does he? The affidavit just indicated that these are items that are commonly used —

MR. SMITH: That's right.

THE COURT: — that he would expect to find in the property that was seized.

MR. SMITH: Thank you, your Honor. That's true. That's correct. That's really all he said, which is interesting to note, inasmuch as he's talking about *a search some 30 days before in Riverside County* with absolutely no tie-in to the defendant here.

The affiant then, under what has generally been categorized by affiant's expertise — and I think it was in this particular affidavit — made certain conclusionary statements, which I noted for the Court were also contained within the affidavit in support of the search warrant for the Crestline cabin.

And subsequently — and we'll get to that particular affidavit —they were also found in the affidavit in support of the search warrant for the

December 4th — or 14th search of the 28th Street residence.

And that was to the effect that it had been the affiant's experience that persons who — involved with the illicit manufacture and/or possession or distribution of narcotics frequently hide these items and formulas and so on and so forth in their homes, on their persons, in their cars, et cetera, away from the actual laboratory operation.

That language, of course, is not a fact that relates anything to 28th Street, other than this individual is alleging that under these certain —it's been his experience that that happens.

I think perhaps in order to tie it in a little more, considering the fact that each of the affidavits had that language, some specifics might have helped, like specific instances in his experience.

In any event, when viewing all of the facts alleged in that affidavit in support of the search warrant — and I note for the record that there has been no challenge as to the truth or veracity of that affidavit; we're not seeking to controvert or traverse the warrant. We're simply suggesting that we have a rental receipt; we have a confirmation from a realtor that someone bearing the defendant's description and showing a driver's license indicating a residence at 1799 West 28th Street in San Bernardino came in and rented the premises. And a confirmation that the Department of Motor Vehicles also has that license — or has that address listed as the home address of the defendant. And then the conclusionary language.

All of the other stuff in between just doesn't in any way at all tie in to the defendant. And in fact, there was absolutely no effort on the part of the affiant to show how what was found in Riverside County had any bearing on the defendant, and particularly how it had any bearing on what might be at his home, or his alleged home, on 28th Street in San Bernardino.

The only tie-in, the only effort to tie it in, is a conclusionary type allegation that people involved in manufacturing or synthesizing narcotics tend to store them someplace other than the place they're doing it, and that those places include their home, their car, et cetera.

Every — everything relating to Sagebrush Trails and for many purposes with respect not only to this motion, but with respect to the proceedings in this entire case — is irrelevant to both the Defendants Morton and Quesada. There's never been any showing they were there. There's no showing by an eyewitness, by hearsay information, by an informant, anything, that the Defendant Morton ever took possession of that cabin; that he was ever seen there; that he ever turned the key and walked in the door even one time.

But even if he had, I don't see that there is any particular factual chain of events that gives this Court or the magistrate issuing that warrant at

the time the ability to say with — with good reason that it's more likely than not that the items — that there is criminal conduct taking place at the residence sought to be searched. And if so, what criminal conduct? Possession of alleged narcotics? What is that showing that shows the Court that?

Is there any real verification other than a check with the Department of Motor Vehicles that the person who alleged to live at 1799 West 28th Street was really who he said he was; that he really actually had that residence; that it wasn't a false I.D., any of those kinds of things; that he didn't forge some kind of a false document, any of those things?

But there's no showing that anyone, including the affiant, knew he was there. There's no information from the informant saying yeah, I buy drugs from him and he lives there; I go there all the time.

There's no showing that simply because a person allegedly rented a property which was allegedly to be used for the manufacturing of narcotics, that that person has some narcotics in his home in a completely different city some 30, 35 miles away. No showing at all.

One of the other requirements prior to the issuance of a warrant — besides probable cause to believe that there's some kind of crime taking place, that it's more likely than not that there's a crime taking place at the residence sought to be searched — is a requirement with some specificity: that the items sought to be seized would be located at the premises to be searched.

Well, the conclusionary language that we're finding in not only this affidavit, but in the affidavit we just discussed, and also in the affidavit we'll discuss subsequently, simply is not a fact. It's the alleged experience of an officer. But it's not a fresh, hard fact that the magistrate can look at and say, oh, gee, that probably makes it true; that makes it more likely than not. Why does it?

And again, I suggest that possibly if the affiant were to write it in a fashion that out of 34 drug laboratories that he had found, he had subsequently searched the residences of the parties involved and at each time, he found narcotics, paraphernalia, formulas, and so forth, that might be something at least to bolster the belief that there might be something at this place to be searched.

But it's not there. And it's conclusionary language. It's like the frequent language one finds in certain incident reports by officers arresting persons who are allegedly under the influence of alcohol while they're driving a vehicle.

I admitted 15 in evidence in a particular case because they all said the same thing and the officer couldn't remember which one he wrote. That's canned language. It's not evidence, it's not a fact. Canned language of this sort is not a fact.

Again, with respect to the information about Sagebrush Trails, above and beyond the allegation that it's irrelevant, and relevancy being that it tends to prove a fact in issue. Well, I don't see how anything about Sagebrush Trails in that affidavit tends to prove that there might be some crime being committed at the 28th Street residence.

It's also stale evidence. It's over 30 days old. If it were taken by itself, absent the finding in the cabin, certainly no one would issue a warrant.

I think really what we have before the Court is the fact that an alleged lab was found on August 3rd, and the renter — the Court sought — or the officers sought to find the person who rented it and searched his home, because they wanted to find out if he was the one that was doing whatever it was being done up there.

They didn't really know. And I don't think they can come to the Court today and say they knew in advance or that they had one real piece of evidence, other than a rent receipt and a driver's license verification.

But any even a scintilla of evidence that might show that this particular person had narcotics, narcotics paraphernalia, et cetera, at his home, because they don't have any evidence that he ever possessed that cabin; they don't know whether he ever walked in there.

Frequently I'm amazed that search warrants are issued. But I'm sure that part of it is because there's a lot of hurrying and moving fast to get things done, and hopefully to seize evidence before it might be concealed or destroyed.

And I think that any reasonable person appreciates the work on the part of the officers involved and the time constraints they may have in any given situation. But there wasn't an allegation to that effect in this particular matter.

And with respect to August 4th, 1981, the affidavit is — does not have any allegation that we've got to get there in a hurry because this person may destroy all the evidence that we believe to be there. And even if they said that, then they'd have to explain what evidence they believe to be there. And it's not explained. There's nothing in the affidavit to show that. There's just a conclusion.

I suppose I could say it's been my experience that courts generally tend to be this way or that way. But that's not evidence, particularly when you're dealing with a specific given situation, and a specific individual's fourth amendment rights.

It might be an interesting situation to find that someone some day forges some documents or uses a false birth certificate and gives an address of one of the justices or one of the judges locally, and then commits a crime and provides that as identification.

And based solely upon that and the conclusionary language of the

officers, they come hit one of the judge's houses in the middle of the night; because it could be done, very easily.

And absent a surveillance or some facts, some current fact that relates to that particular person's conduct and that person's activities at that residence showing a crime, I just don't see how there can be a finding that it's more probable than not that there are narcotics and/or paraphernalia and so forth at that residence.

## *SECTION TWO:*

## *THE 28TH STREET WARRANT*

## *(August 4, 1981)*

## V

### THE TRIAL COURT'S IMPLICIT FINDING THAT THE AFFIDAVIT IN SUPPORT OF THE SUBJECT SEARCH WARRANT CONTAINED FACTS SUFFICIENT TO CONSTITUTE PROBABLE CAUSE WAS REVERSIBLE ERROR.

Appellants incorporate herein by reference all authority previously cited respecting the criteria established by the courts to test the sufficiency of an Affidavit for probable cause, as well as the showing required upon the part of the Appellants before this reviewing court is warranted in finding that the affidavit is insufficient, as a matter of law.

At the trial court, Appellants prefaced their argument by recitation of the facts alleged by the Affiant in his Affidavit in Support of the Search Warrant (C.T., II, 274, 15-28; 275; 276, 1-16). In addition, Appellants suggested that the Affiant's conclusionary language regarding his experience with respect to subjects involved in the illicit manufacture of narcotics, "that they often hide the same in their homes or on their persons or in their vehicles away from the actual laboratory operation," as noted in Section One, Page 30, *supra*, is the same conclusionary language contained within all three of the Search Warrants which are being challenged upon appeal herein.

The Appellants argued that the facts so recited by the Affiant in his Affidavit didn't in any way tend to establish that the Appellant MORTON resided at the address of the property to be searched, and that a drivers license shown upon signing a rental agreement and an inquiry to the Department of Motor Vehicles confirming Appellant MORTON'S drivers license address, absent some surveillance, informant informa-

tion, or otherwise, simply was insufficient to establish that any particular individual connected with the findings of the August 3rd Search Warrant (Section One) resided therein. Further, Appellants argued that the Affiant failed to establish with any degree of certainty that Appellant MORTON did in fact reside at the subject property on the day in question.

In addition, Appellants argued that the Affidavit failed to establish facts sufficient to justify a magistrate's belief that a crime had been or was being committed at the subject property, nor was there any showing, other than conclusionary language, that the narcotics sought to be seized would be located upon the premises sought to be searched.

Appellants argued that other than the conclusionary or "canned" language of the Affiant regarding his experience with persons involved in the illicit manufacture of narcotics and where they may hide the same, there was not even an effort by the Affiant to establish that somehow it was more likely than not that the property sought to be seized would be located at the premises to be searched (R.T., 2, 292-301; 302, 1-20).

Appellants also argued that some of the information contained within the Affidavit in Support of the Search Warrant was stale, and, therefore, should have been excised from the subject Affidavit (R.T., 2, 278; 279, 1-14).

The People argued that an experienced narcotics officer's opinion on the modus operandi respecting the location of drugs and/or records at various places is competent evidence for the magistrate to consider (R.T., 2, 424, 27; 425, 1-3).

In addition, the People argued that "numerous cases have upheld Search Warrants on the theory that one who sells narcotics may have more at his residence or place of operations" (R.T., 2, 425, 4-6).

The People resolved then that the above theory should apply in the instant matter, because where there is an allegation of the manufacture of narcotics, "the purpose is obviously to sell the finished product" (R.T., 2, 425, 6-8).

The People bolstered this argument by suggesting that because Appellant MORTON had rented the Crestline premises which had been turned into a laboratory, it was reasonable for the magistrate to infer that Appellant MORTON was not only in control of the premises, but was probably "the heavy" or seriously involved in the establishment and operation of the lab. The People then argued that this reasonable inference, as well as the above arguments regarding an experienced officer's opinion, leads one to strongly suspect that an individual involved as the Appellant MORTON was alleged to have been, "may have at his house finished product for distribution, supplies and apparatus to furnish this laboratory or the next one or the last one, and money

and book work from various purchases and sales. The officers experienced belief lends credence to this natural process of reasoning" (R.T., 2, 425, 12-20).

The People then offered case law with respect to the probable cause requirement.

In addition, the People argued that the Affidavit contained information that during the Crestline search, the names of two people who were renters of the referenced Desert Hot Springs residence which allegedly contained a laboratory some six weeks earlier was not stale information, but evidence tending to show a continuing activity by those (two) people. The People suggested that the only inference to be drawn from that information is that if the Appellants "associates are dopers, he is probably one himself. That is a reasonable inference, but hardly a probable basis for issuance of the search warrant" (R.T., 2, 426, 6-15).

With respect to the claim by Appellants that the Affiant's conclusionary language is not to be considered as a fact in support of probable cause, the People argued that "if it is a fact of experience, it is a fact of experience. And it is canned language because it is a predictable fact from the officer's experience" (R.T., 2, 320, 7-19).

There was no evidence introduced at the time of the hearing, or at any time throughout the course of the proceedings in the lower courts to establish that there was any surveillance conducted of the residence of the defendant prior to the issuance of the subject Search Warrant, other than a cursory examination of the exterior of the residence for the purpose of describing the same with particularity in the Search Warrant.

The court denied Appellants' Motion to Suppress with respect to the August 4, 1981, Search Warrant for the search of the 28th Street residence, and made no specific findings in that regard. The court did also deny the Appellants' Motion to Traverse the subject warrant, even though none was made (R.T., 2, 469, 7-15). (It should be noted here that the court made the same such denial with respect to the December 14 Search Warrant for the second search of the 28th Street residence — Section Three, *infra*, and no such motion was made with respect to that warrant, either. (R.T., 2, 469, 15-19)).

From the court's ruling, it is reasonable to assume that the court did find probable cause from the facts as alleged in the Affidavit.

**FN 130**

The references to the June 25, 1981 discovery of a clandestine laboratory within a residence located on Sagebrush Trails in Desert Hot Springs is not only a subject of a hitch motion submitted herewith by defendant, to which defendant makes reference, but also is, at best

extremely stale information.

As noted above, the facts presented to the magistrate must tend to show that the property to be seized will be present at the time of issuance of the warrant at the property sought to be searched. Both Federal and State Constitutions require recent information. *Sgro v. U.S.*, 287 U.S. 207, 210 (1932); *People v. Mesa*, 14 Cal.3d 466 (1975); and *Alexander v. Superior Court*, 9 Cal.3d 387 (1973). From the foregoing authorities, it appears that what determines staleness is largely left to a case-by-case analysis. If the probable cause was secured within 15-days, the warrant will probably sustain scrutiny. If it is from 15 to 30-days old, the court will look carefully at what items are being sought, and generally give the defendant the benefit. If the information is older than 30-days, however, the prosecution generally has a difficult burden in justifying the warrant. In the instant case, the information regarding the Sagebrush Trails residence clearly was over 30-days old, and therefore should be excised from the warrant as being stale.

Appellants also argued that some of the information contained within the Affidavit in Support of the Search Warrant was stale, and, therefore, should have been excised from the subject Affidavit (R.T., 2, 278; 279, 1-14).

FN 132

In addition "numerous cases have upheld search warrants on the theory that one who sells narcotics may have more at his residence or place of operations." *People v. Superior Court*, 27 Cal.App.3d at 413.

FN 133

This notion should apply as well to those involved in the making of drugs because the purpose obviously is to sell the finished product.

FN 139

THE FACTS ALLEGED IN THE AFFIDAVIT IN SUPPORT OF THE SEARCH WARRANT FOR THE AUGUST 4TH, 1981 SEARCH OF THE 28TH STREET RESIDENCE WERE CONSTITUTED PRIMARILY OF EVIDENCE SEIZED PURSUANT TO THE WARRANT EXECUTED ON AUGUST 3, 1981 AT THE CRESTLINE RESIDENCE, AND THEREFORE WERE "FRUIT OF THE POISONOUS TREE" AND AS SUCH, MUST BE EXCISED FROM THE AFFIDAVIT WARRANT WITHOUT PROBABLE CAUSE,

WHEN REVIEWING THE SAME FOR A DETERMINATION OF PROBABLE CAUSE.

*Wong Sun v. United States*
371 U.S. 471 (1963);

*People v. Dowdy*
50 Cal.App. 3d 180 (1975);

The Court then discussed situations where the Government might learn of evidence from an independent source, as in *Silverthorne Lumber Co. v. United States,* 251 U.S. 385 or situations where the connection between "the lawless conduct" of the Police and the discovery of the challenged evidence has become so attenuated as to dissipate the taint. (Citing *Nardone v. United States,* 308 U.S. 338.) Following this analysis, the Court fashioned a rule which, defendant Morton alleges is the rule to be applied in the instant case with regard to the August 4, 1981 search of the 28th Street address. The Court held that rather than asking whether evidence is "fruit of the poisonous tree" because it would not have come to light but for the illegal actions of the Police, the Court should, more appropriately, ask:

> "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged from the primary taint." (Citation omitted.)

In the instant case, the defendant herein challenges the prosecution to show why it would have had any reason to even look for this defendant had the August 3, 1981 search of the Crestline cabin not taken place. It is clear from the state of the evidence in this case the defendant had not been under surveillance, that the Officers involved in serving the August 4, 1981 Warrant at the 28th Street residence had no information of the defendants involvement in any criminal activity, much less the manufacture and/or distribution of Methamphetamines. Clearly, the prosecution's suspicions were not aroused until the alleged discoveries at the Crestline cabin on August 3, 1981.

Furthermore, the prosecution is certainly hard-pressed to argue that the taint of the unlawful search of the Crestline cabin had become so attenuated as to dissipate the taint only approximately 24 hours later.

Applying the test of *Wong Sun*, it becomes evident that if this Court finds that the Affidavit in Support of the Search Warrant for the August

3, 1981 search of the Lake Gregory Drive did not contain facts sufficient to constitute probable cause, thereby quashing the subject Warrant, then the August 4, 1981 search of the 28th Street residence was the result of an exploitation of the illegality of August 3, 1981. Specifically, because the August 4, 1981 Affidavit in Support of the Search Warrant at the 28th Street residence for the same date consisted primarily of facts derived from the August 3rd search, with no independent evidence regarding the defendant, excepting a driver's license check and information from a realtor that the defendant had rented the subject residence, it cannot be disputed that there would have been no reason to look for the defendant, much less search his home, had it not been for the discoveries made pursuant to the August 3, 1981 search of the Crestline residence.

In assuming that the Court had ruled favorably with respect to the defendant's motion to suppress evidence and/or to traverse the warrant in the Crestline cabin, then clearly, anything — any information used in the affidavit in support of the search warrant for the August 4th search of the defendant's residence at 28th Street could not be used in the affidavit as being fruit of the poisonous tree based on Wong Sun.

I also, just for the record, noted that — the theory is that if you can dissipate the taint in some way, the tainted evidence, showing that you have found the evidence, or the facts in support of probable cause for a subsequent warrant, that the taint is no longer applied, and independent evidence would be available.

And it's very, very clear I think to all concerned that absent the August 3rd, 1981, search, there would have been no reason to look for the defendant at 28th Street or anywhere else.

**FN 140**

I think with regard — with the overall consideration of the fact that they had a valid, what is now to be determined, a valid August 3 search of the Lake Gregory Drive property, findings there and now determine to be valid search of the 28th Street property.

**FN 142**

The facts alleged by the affiant in his Affidavit in Support of the Subject Search Warrant can be outlined as follows:

A. That on August 3, 1981 sheriff's office personnel served a Search Warrant on the Lake Gregory residence as hereinbefore described, "where a clandestine Methamphetamine laboratory was in operation";

B. That subsequent to the service of the Crestline warrant, a second

Search Warrant was served at the home of the defendant herein at 1799 West 28th Street, San Bernardino, California (No date specified in the affidavit; the true date was August 4, 1981). Further that during the course of said search, "numerous items of evidence linking the defendant herein to a conspiracy to manufacture and distribute Methamphetamines were seized";

C. That subsequent to the service of the 28th Street Warrant and the arrest of the defendant herein (again no date specified), the affiant allegedly received information from "an unproven informant" that this defendant was still dealing in large quantities of Methamphetamines;

D. That (on a date again not specified) the affiant conducted an interview with the defendant which was subsequent to his arrest "wherein he admitted his participation in a conspiracy to distribute Methamphetamines and association with SEAN FAHY, a wanted fugitive, and manufacture (sic) of controlled substances."

E. That on December 14, 1981 (the day the affidavit was executed), the affiant conducted an interview with a "reliable Confidential Informant," who advised the affiant that he (the informant) was to purchase between two and four ounces of Methamphetamine from a subject named Michael Apillo for approximately $1,400.00 per ounce, on the same date.

F. That the informant had further advised the affiant that on December 3, 1981 he had purchased a "sample" of Methamphetamine for $25.00 from the same Michael Apillo, and "that" sample purchase was made in furtherance of the larger purchase and investigation". Also, that during the December 3rd meeting, Michael Apillo allegedly showed the informant a scale and how to use it to weigh narcotics for resale;

G. That on December 12, 1981 the informant allegedly met with Michael Apillo, Shirley Winters, and others to "firm-up" the terms of the December 14th purchase and sale of Methamphetamines;

H. That when this meeting concluded, Michael Apillo asked the informant to take him to Sambo's Restaurant on Highland Avenue in San Bernardino;

I. While at Sambo's Restaurant, the informant was introduced to an individual named "Chet" who drove a specifically-described automobile, and that the informant, Michael Apillo, "Chet," and others apparently sat down in the restaurant, where the informant allegedly overheard Michael Apillo tell "Chet" that he was selling Methamphetamine to the informant Monday night (December 14, 1981);

J. The informant alleged that prior to Michael Apillo making this statement, he overheard "Chet" tell Mr. Apillo that his "stuff" was ready that he needed for Monday night;

K. The informant further alleged that he had heard Mr. Apillo call

Methamphetamine "stuff" on prior occasions, and the affiant alleged that he had also heard narcotic substances referred to as "stuff";

L. That during the December 12th meeting, the informant witnessed "Chet" produce a clear plastic baggy containing a white powder (alleged by the affiant to be a suspected controlled substances) and offered some to the informant, which the informant declined to accept;

M. The informant also told the affiant that "Chet" stated that he had just returned from processing the substance offered;

N. The informant told the affiant that he had heard Michael Apillo and Shirley Winters speak of "Chet" in the past but that was the first time that he had met him. Also that when making reference to "Chet" in the past, both Mr. Apillo and Ms. Winters had told the informant that "Chet" had good speed and coke;

O. The informant also told the affiant that he had heard Mr. Apillo tell Ms. Winters on a prior occasion (no date specified in the affidavit) that Mr. Apillo was going to meet "Chet" to get some "stuff" to take to a bar in San Bernardino;

P. The affiant then alleged that he showed the informant a photographic line-up containing six male subjects and asked if he recognized anyone depicted and that the informant, "without hesitation" correctly identified defendant Morton;

Q. The affiant then alleged that the Corvette automobile driven by "Chet" belonged to "Morton" and was claimed by "Morton" to have been a gift from SEAN FAHY;

R. Finally, in terms of specific facts alleged, the affiant stated that on August 4, 1981 during the search of "Morton's" home, a large quantity of Methamphetamine was seized.

In addition to the facts alleged as outlined above, the affiant then stated that based upon the reliable confidential informant's information, and "the known association of 'Morton' with the manufacture and distribution of Methamphetamines", that the affiant believed that additional evidence of that criminal activity would be found at the 28th Street residence. The affiant also alleged that he believed that other evidence would be found at the 28th Street residence which might identify other persons involved in a conspiracy to manufacture and distribute Methamphetamine, as well as locations where other criminal activity may be found. Finally, the affiant further alleged that non-perishable evidence "such as address books, laboratory equipment, receipts, rental agreements" ... etc. "should be present at this location". The affiant then concluded his paragraph with an allegation that "items such as these should be kept as usual course of business by occupants, and not subject to routine depletion such as narcotic substances."

The affiant then delineated his experience ("AFFIANT'S EXPERI-

ENCE") wherein he made, almost word for word, the same conclusionary statement with regard to subjects involved in the illicit manufacture and/or possession of narcotics hiding the substances, etc., "in their homes, on their persons, and in their vehicles." The affiant further alleged that it had been his experience that these same individuals "also possess in their homes, vehicles, and on their persons, narcotics formulas, business ledgers pertaining to narcotics transactions, and other documents tending to identify other persons involved." In addition, under "AFFIANT'S EXPERIENCE" there are also two other paragraphs of conclusionary language regarding false identities and illegal businesses and that telephone toll information is crucial in successfully investigating such criminal activity. Also that persons involved in the illegal manufacture of controlled substances often possess false identifications, operate vehicles registered in names other than their own.

Defendant Morton challenges the prosecution to show how any of the facts outlined above, and alleged by the affiant in his Affidavit in Support of the Search Warrant, would justify a man of reasonable caution in the belief that a crime had been or was being committed at the 28th Street address, and how sufficient facts were alleged to reasonably permit the magistrate to infer the probability that the specific things outlined in the Affidavit in Support of the Search Warrant would be located at the 28th Street residence at that time.

Nowhere in the Affidavit does the affiant allege that he had any personal knowledge (other than stale information which will be discussed more fully, *infra*) or that information had been derived by way of surveillance, or even information from an informant which would indicate that any particular criminal activity was taking place at the 28th Street residence. Furthermore, nowhere in the Affidavit was there an allegation, whether based upon fact or otherwise, that the defendant herein continued to reside at the 28th Street residence at the time the Affidavit was prepared.

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This defendant intends to show by way of this Memorandum, as well as all evidence to be introduced at the time of hearing on these motions, that each fact alleged by the affiant in support of the December 14th Search Warrant (as outlined above) should have been excised by the magistrate in reviewing the Affidavit, and because each said fact was not, the magistrate improperly issued the subject Search Warrant. In this light, the defendant submits the following analysis in support of his contentions.

## XII. I

## THE AFFIDAVIT CONTAINED NUMEROUS ALLEGATIONS OF FACT WHICH WERE CLEARLY THE PRODUCT OF STALE EVIDENCE, AND, THEREFORE, THE SAME MUST BE EXCISED FROM THE AFFIDAVIT FOR THE PURPOSE OF DETERMINING PROBABLE CAUSE.

As discussed in detail in Section II, facts presented to the magistrate by way of affidavit for the purpose of establishing probable cause for the issuance of the Search Warrant must show that the property to be seized will be present at the time of issuance of the warrant. *See, Sgro v. United States, supra; People v. Mesa, supra;* and *Alexander v. Superior Court, supra.* Although what is "stale evidence" has generally been left to a case by case analysis, it is clear that information (facts) older than 30-days place a very difficult burden upon the prosecution to justify the issuance of the subject warrant.

In his Affidavit in Support of the Search Warrant, the affiant describes the August 3, 1981 Crestline search and its fruits, as well as the August 4, 1981 28th Street search and its fruits. Considering the fact that the evidence sought to be introduced by the People seized during the course of those two searches was, at the time of application for the December 14th Warrant, some four and one-half months old, it seems clear that the prosecution has a very heavy burden to establish that this information was properly considered by the magistrate. The defendant contends that such information should be excised from the Affidavit for the purpose of reviewing the Affidavit for current information and/or facts which would justify the issuance of the subject Warrant. Furthermore, considering the length of time between the August searches and the December search the defendant submits that without further argument in this regard, it is the burden of the prosecution to so justify the consideration of this information for purposes of determining probable cause on December 14, 1981 to search the 28th Street residence.

The affiant alleged that subsequent to the service of the August 4th Search Warrant at the 28th Street residence, and the arrest of the defendant, he received information from an "unproven informant" regarding this defendant's alleged continued activities in the sale of large quantities of Methamphetamines. Considering that there is no date specified as to when the affiant received this information, only a reference that he had received the information subsequent to the service of the August 4th Search Warrant, and further considering the structure of the sentence in which the allegation is contained, it is reasonable to assume that the information so provided is also stale. Furthermore, it is clear that such evidence would be subject to challenge on the grounds

that is is vague as to time and place. Therefore, in considering the facts alleged for purposes of constituting probable cause, the magistrate should have excised this information, or requested further specificity from the affiant pursuant to provisions outlined in *Penal Code* Section 1526. In any event, due to its staleness, as well as the staleness of the information derived from the August 3rd and August 4, 1981 searches, the court must certainly consider the weight of this evidence, and, in light of the fact that when combined none of the facts alleged tend to show any activity taking place at the 28th Street residence on December 14, 1981, the same is simply irrelevant.

The affiant also alleged that he had conducted an interview with the defendant herein subsequent to his arrest wherein the defendant made certain incriminatory admissions. Again, the affiant did not specify a date when this interview occurred, and this defendant intends to show at the time of hearing on these motions that said interview took place on September 24, 1981, and therefore was over three months old, and subject to be excised as "stale information". Furthermore, as will be discussed more fully in Section Three of this Memorandum, this defendant submits that at no time had he made any statements to the affiant which could be properly construed as an admission of his participation in a conspiracy to distribute Methamphetamines. Finally, this defendant will also show this court that such statements would not be admissible for any purposes even if they had been made, as the same are incriminatory, and would have been taken in violation of the defendant's Fifth Amendment Privilege Against Self-Incrimination as per *Miranda v. Arizona* and its progeny.

Subsequent to three paragraphs containing allegations with regard to information received by a "reliable confidential informant," the affiant again made reference to the August 4, 1981 search of the 28th Street residence, and specifically stated that a large quantity of Methamphetamine was seized during the course of that search. Again, as delineated above, this information is clearly stale, and should not have been considered by the magistrate for purposes of determining probable cause.

Based upon the foregoing, it becomes clear that the facts above-described used by the affiant for purposes of a probable cause determination should not have been considered by the magistrate because they were stale, and that the prosecution must bear the burden of establishing the contrary.

XII.II

THE AFFIDAVIT IN SUPPORT OF THE SEARCH WARRANT CONTAINS NUMEROUS ALLEGATIONS OF

FACT ALLEGEDLY DERIVED FROM INFORMATION RECEIVED BY INFORMANTS, WITHOUT ESTABLISHING THE CREDIBILITY OF SAID INFORMANTS, AND THEREFORE, SAID INFORMATION MUST BE EXCISED FROM THE AFFIDAVIT.

The first informant to whom the affiant made reference was designated by the affiant himself as "an unproven informant". When coupled with the fact that there was no date when that information was provided to the affiant, it becomes clear that this information was obviously unsubstantiated hearsay from an unreliable informant and, as such, fails to meet the "two-pronged" test established by the United States Supreme Court in *Aguilar v. Texas* 378 U.S. 101 (1964); and *Spinelli v. United States*, 393 U.S. 410 (1969). By the affiant's admission, a lengthy analysis of the above-referenced cases is unnecessary. This defendant anticipates that the prosecution will argue that although said informant was "unproven" his information can be used for purposes of corroborating the subsequent information acquired through the second informant discussed by the affiant. However, the defendant submits that absent some point of reference vis-a-vis the date the subject information was acquired, it would seem illogical, absent testimony before the magistrate pursuant to *Penal Code* Section 1526, for the magistrate to arrive at such a conclusion. Furthermore, it was the affiant's burden to show that the information received from this unproven "informant" somehow corroborated the information subsequently received by the "reliable confidential informant".

With regard to the "reliable confidential informant," the affiant offered the magistrate absolutely no information which would justify the magistrate in believing said "informant" was in fact reliable. Again, there is no showing that evidence was taken pursuant to *Penal Code* Section 1526, and therefore, it is clear that the magistrate in reviewing this information assumed that the "informant" was in fact reliable in considering the information given to the affiant by said informant. Furthermore, it is clear that the test for reliability of an informant is "two-pronged" and that the magistrate must first determine that the affiant had personal knowledge of the location of the items to be seized. In *People v. Hamilton*, 71 Cal.2d 176 (1969), the informant stated that the defendant had in her possession 300 rolls of pills in tin foil in groups of ten pills per roll. Clearly, this description of the items to be seized contained enough specificity to indicate that the informant might have personal knowledge as to the facts alleged. However, the description in itself was found defective by the Court to establish that the informant had personal knowledge of the particular location of the contraband. In

this regard, the court stated:

> "While we do not reject the possibility that an informant who fails to provide factual allegations of his own experience might nevertheless provide a description of the contraband itself or its particular location so detailed as to warrant the inference of personal observation, we do not believe that the description here in question is sufficient for the purpose."

(71 Cal.2d at 181.)
(See also *Halpin vs. Superior Court*
6 Cal.3d 885 (1972); and

*People vs. Nadell*
23 Cal.App.3d 746 (1972).

Although it appears that the informant gave certain information based upon personal knowledge, at no time does the affiant allege that the informant told him that the items to be seized would be found at any particular location. On the contrary, there is no allegation that the informant even knew where this defendant resided. From the Affidavit it appears that the affiant had only met this defendant on one occasion, two days prior to the issuance of the subject Warrant at a restaurant in San Bernardino. Therefore, the affiant failed to satisfy the first-prong, commonly referred to as the "personal knowledge" prong, and therefore all information alleged by the affiant to have been received by the informant must be excised from the Affidavit.

In addition to failing to satisfy the first-prong of the *"Aguilar-Spinelli* two-pronged test," the affiant failed to allege facts which would justify the magistrate in believing that the informant was believable. In fact, there is not one allegation, other than the conclusion on the part of the affiant that the informant was reliable, to have led the Magistrate to determine that the informant was believable and/or trustworthy.

It is anticipated that the prosecution will argue that in light of all other facts alleged in the Affidavit, the informant should be deemed reliable because he is giving information about the alleged involvement of the defendant herein in illicit narcotics activities. Furthermore, it is anticipated that the prosecution will argue that the information given to the affiant by the informant was incriminating, and therefore reliable. However, if the informant had in fact been giving information to the affiant that was self-incriminating, it was the duty of the affiant to inform the magistrate of this fact. As is often the case, informants provide information to police officers for the purpose of avoiding prosecution

for their own criminal activities, or as is equally common, for letters of recommendation from the respective police officers for purposes of sentencing when said informants may have been convicted of a crime.

As appears from the testimony of the affiant subsequent to issuance and service of the challenged Warrant, the "reliable confidential informant" had never been used by the affiant as a source of information, (R.T., June, p. 109, 8-10), but that the informant was being used by another sheriff's detective on another matter. (R.T., June, p. 109, 11-14).

In light of this testimony, two things become equally clear. First of all, not only did the affiant not allege facts which would justify the magistrate believing that the informant was reliable, but the affiant could not have alleged any such facts because he had no personal knowledge of the reliability of the informant. Secondly, the testimony clearly indicated that the informant was in fact working with the Sheriff's Office, making it increasingly unlikely that any of the information given by the affiant to any of the Sheriff's Office detectives with whom he was working would constitute self-incriminating statements.

In failing to provide the magistrate with corroborating information that would lead the magistrate to believe that the informant was believable and/or trustworthy, or that the information was reliable, the affiant failed to satisfy the second-prong of the *Aguilar-Spinelli* holdings, thus requiring the magistrate to excise all of the information provided by the affiant via the informant.

Again, the defense anticipates that the prosecution will attempt to show that the information provided by the informant was credible and/or reliable because the same is corroborated by information provided by the "unproven informant", as well as the evidence seized during the August searches. In fact, Judge Kennedy, in responding to the challenge of the defendant on these same issues at the Preliminary Hearing, suggested that the information from the "reliable confidential informant," when coupled with the information provided by the "untested informant" and the fact of prior arrest of the defendant, plus the observations at the residence on August 4, 1981 plus the allegation of an admission by the defendant (at an unspecified date), was somehow sufficient to corroborate the information provided by the "reliable informant". (R.T., April, p. 52, 18-26 and p. 53, 1-3.) Furthermore, the prosecution argued that the "reliable informant" was "by virtue of his detailed observations" ... (personal knowledge prong) ... "presumed to be telling the truth." (R.T., April, p. 56, 7-9.) Finally, Judge Kennedy made a determination that the information received from the "reliable informant" was corroborated for two reasons, i.e., that the alleged facts so provided were clearly statements against the informant's penal inter-

est, and secondly that the information so provided was corroborated by the other facts alleged in the Affidavit (See "state evidence" argument, *supra*) and that the informant provided such detail to his information that it "suggests to me internal reliability". (R.T., April, p. 58, 17-26.) Clearly, such reasoning does not satisfy the requirements delineated by the United States Supreme Court in creating the *Aguilar-Spinelli* two-pronged test.

In the Superior Court, in Case No. CR 38968, the Honorable Fenton Jones upheld the challenged Warrant on the basis that, beginning with the Crestline Warrant served on August 3, 1981, issued subsequent thereto would stand or fall based upon the validity of the Crestline Warrant, because "this whole thing was a house of cards". (R.T., Aug., 1982, p. 66, 13-14) In addition, Judge Jones stated that he was upholding the Warrant based upon what was contained in the Affidavit on that particular Search Warrant. Judge Jones provided nothing more in terms of reasons why he believed that, for example, the informant's information satisfied the *Aguilar-Spinelli* test, or why he believed that the Affidavit in Support of the subject Warrant contained sufficient facts to constitute probable cause for its issuance. In this light, the defendant suggests that the prosecution's argument that the validity of this and the other challenged Warrants has already been established by the Superior Court in Case No. CR 38968. Based upon the foregoing, the facts alleged by the affiant, derived from information received from the two informants must be excised from the Affidavit. Without this information having been presented to the Magistrate, it is hard to imagine why the Magistrate would have had seriously entertained the affiant's application for the December 14th Search Warrant.

## XII.III

## WHEN AN AFFIDAVIT IN SUPPORT OF A SEARCH WARRANT CONTAINS CONCLUSIONARY LANGUAGE, THE SAME MUST BE SUPPORTED BY FACTS PRESENTLY IN POSSESSION OF THE AFFIANT IN ORDER FOR SUCH LANGUAGE TO HAVE ANY EVIDENTIARY VALUE.

Under the section entitled "Affiant's Experience" the affiant provided the magistrate with four paragraphs, only one of which appears to have any relevancy in making a determination whether the affidavit contained sufficient facts to constitute probable cause. The first paragraph under "Affiant's Experience" is a synopsis of the affiant's experience as a Deputy Sheriff in the County of San Bernardino and provides the magistrate with some understanding of the affiant's expertise. The

second, third, and fourth paragraphs consist solely of conclusionary language regarding the affiant's experience with subjects involved in the illicit manufacture and/or possession of narcotics. Nowhere within these paragraphs, or within the entire Affidavit itself, are there facts which would tend to confirm the conclusions of the affiant with respect to the residence of the defendant on December 14, 1981. Specifically, the affiant does not allege that he had any information that any narcotics might be at the 28th Street residence, or that during the August 4, 1981 search at the 28th Street residence any particular business ledgers, etc., were recovered, and in all likelihood they would be recovered again.

Paragraphs 3 and 4 made reference to the affiant's experience with regard to false names and addresses and false identifications used and/or possessed by persons involved in the illegal manufacture of controlled substances. Within the entire Affidavit there is not one scintilla of evidence which would tend to indicate that the defendant may be in possession of evidence of the use of false identifications, false names, or the registration of any of his vehicles in the names of other persons for the purpose of concealing his identity. In addition, under the section entitled "property to be seized" the affiant does not designate any such items to be seized.

The defendant refers to Section One and Section Two, *supra*, wherein it was noted that both of the Affidavits in Support of the respective Search Warrants discussed therein contained language almost identical to the language presently referenced. It has been the experience of this attorney that officers involved with the detection and/or control of the illicit manufacture and sale of narcotics often use this language for the purpose of convincing the magistrate that their conclusions are relevant evidence and that the same such language is most frequently employed by said officers in Affidavits in Support of Search Warrants when they possess no specific and articulable facts to show that their conclusions are warranted in the given situation.

Based upon the foregoing, it becomes clear that had the issuing magistrate carefully examined the Affidavit in Support of the Search Warrant, he would have found it necessary to examine the affiant via *Penal Code* Section 1526 for the purpose of eliciting testimony which might establish why the affiant believed the "reliable confidential informant" was so qualified. Furthermore, it is clear that the allegation regarding the August 3, 1981 search, and its fruits, and the August 4, 1981 search, and its fruits, was *very* stale information, and as such, was improperly considered as relevant and/or competent information tending to establish facts which would assist the Magistrate in making his probable cause determination.

The Court must view the language of the affiant with regard to the

alleged behavior of individuals involved in the illicit manufacture and/or possession of narcotics for what it is, to wit: bold-faced conclusions lacking relevant evidence to substantiate the validity of these representations with respect to the issuance of a Search Warrant on December 14, 1981 for a search of the residence located at 1799 West 28th Street.

As referenced above, even if the magistrate had correctly determined that all of the facts alleged within the subject Affidavit were property submitted for his consideration, and that the same were relevant for the purposes of a probable cause determination, the Affidavit does not contain facts sufficient to establish two elements essential to the validity of the Search Warrant issued by the magistrate, when his determination was made solely upon the Affidavit in Support of the Search Warrant. The first element missing from the Affidavit is some form of representation by the affiant, by way of personal knowledge or other acceptable evidence, that the defendant herein was residing at the 28th Street residence on December 14, 1981. It appears as though the affiant assumed that because a Search Warrant had been served at that residence on August 4, 1981 and that the defendant was residing at that location at that time, that the defendant would still be residing there some four and one-half months later. If the affiant truly had facts sufficient to justify probable cause for the belief that the defendant was involved in some illegal activity, it would seem a simple task to confirm whether the defendant did in fact reside at the property to be searched. The 4th Amendment prohibits unreasonable searches and seizures. Would the search of the 28th Street residence have been reasonable if someone else were residing there at the time of the service of the warrant? One must inquire how it was the magistrate knew that the defendant resided at 1799 West 28th Street on December 14, 1981.

Secondly, another essential element missing from the Affidavit is some evidence tending to show that any of the property to be seized would be located at 1799 West 28th Street on December 14, 1981. Nowhere in the Affidavit is there to be found any specific and articulable facts which would justify in determining that the property to be seized might be located at the property to be searched. Other than the conclusions of the affiant regarding the general behavior of persons who manufacture and/or distribute controlled substances, there is not a single allegation that the defendant did in fact possess any of the specific property to be seized within the premises located at 1799 West 28th Street at any time reasonably close to the date of issuance of the Warrant.

It is anticipated that the prosecution will argue that the conclusions of the affiant are not only based upon experience, but tend to be logical

because drug manufacturers and/or distributors have to store their contraband someplace. It would seem equally logical that having had his residence searched in August of 1981, the defendant would be unlikely to possess items specified as property to be seized at his residence. Furthermore, it would seem equally logical to assume that if the defendant were in fact involved in some on-going conspiracy to manufacture and/or distribute Methamphetamines, that he would relocate his place of residence in order to elude detection by law enforcement officials. The point thus made is that conclusionary language, without more, is susceptible of many reasonable inferences, which results in the potential hazard of a magistrate improperly issuing a Search Warrant for the residence of a citizen who recently moved to the property to be searched, or the increased possibility of the service of a Search Warrant on the residence of an individual who, although previously may have been involved in some criminal activity had not recently been so involved, and who may in fact have drastically altered his lifestyle, with the possible effect that the individual's alleged unsavory past results in a denial of his Constitutional rights in the present.

Is it proper for the magistrate to assume the existence of facts not alleged in an Affidavit in Support of a Search Warrant? It seems clear from a review of the foregoing, that the magistrate issuing the December 14, 1981 Search Warrant authorizing a search of the residence located at 1799 West 28th Street in San Bernardino must necessarily have assumed the existence of several facts. First, the magistrate must have assumed that the "confidential reliable informant" was so qualified. Second, the magistrate must have assumed that because of the existence of the August 3rd and August 4th searches and the evidence seized at the respective locations, that the defendant herein was continuing to engage in such activities. Third, the magistrate must have assumed that the defendant did in fact continue to reside at the 28th Street residence. Fourth, the magistrate must have assumed that the property to be seized would be located at the property to be searched on December 14, 1981. Finally, the magistrate must have assumed that the affiant's conclusions about the general behavior of persons involved in the illicit manufacture and/or possession of narcotics would also be true with respect to this defendant.

One test for determining probable cause for the issuance of a Search Warrant is whether the Affidavit in Support of the Search Warrant states facts that make it substantially probable that there is specific property lawfully subject to seizure presently located in the particular place for which the Warrant is sought. *(People v. Cook, Supra.)* If a Magistrate, upon reviewing an Affidavit in Support of a Search Warrant must assume the existence of certain facts, then the same are not facts,

and therefore one must ask what the magistrate found to assist him in his determination that it was substantially probable that there was specific property lawfully subject to seizure located at 1799 West 28th Street in San Bernardino on December 14, 1981

From the foregoing, the defendant respectfully submits that the Search Warrant issued on December 14, 1981 authorizing a search of the residence located at 1799 West 28th Street in San Bernardino was improperly issued, and therefore, that the same must be quashed, and the evidence seized pursuant thereto suppressed.

MR. SMITH: Yes. Thank you.

I think probably there are three kinds of facts alleged in the affidavit. One is stale things, facts, things talked about in the August 3rd or August 4th searches. The cases make clear the People have a very heavy burden; over — information over 30 days' old and we have a three and a half months' information, four and a half. My memory isn't very good.

I outlined for the Court what I believed the facts to be and simply took paragraph by paragraph from the affidavit. Items A through C, are clearly derived from what would be stale information. And in all fairness to the American public, the Courts decided even if someone did something three or four months ago — I was showing today; have to have something more relevant and current. And the People suggest, "Well, yes, one can bind with all these other neat details. It's relevant."

It's not relevant, period, especially when we look at the "D." It's also stale because there is no date specified.

"E" through "P," the facts alleged is recitation of information received from a person who is determined by the affiant or alleged by the affiant to be a confidential reliable informant.

The Court can note from the testimony given, not only wasn't there anything in the affidavit, but the affiant himself acknowledges he did not provide any information which the magistrate could make a determination in which this reliable informant was in fact reliable.

We have a United States Supreme Court decision which appears not to be retroactive. It made it — reversed Aguilar and Spinelli. At least at the time this case was first filed and up and through the date the notice, Aguilar and Spinelli was still the law.

And the thing the Court is aware of the requirements of the two prong test, requiring the informant to speak from pesonal knowledge and to be established as being trustworthy and trustworthy be fashioned by price, use and that kind of thing, none of which was alleged in the affidavit.

And apparently, there was no testimony, which I should have received a copy of had there been, pursuant to 1526. The magistrate didn't have anything before him to make a determination that this

particular informant was reliable.

The only other possible corroboration is the unproven informant making a blanket statement that the defendant was still dealing in Methamphetamines. Was that stale information? We don't know because we don't know the date, simply subsequent to August 4th.

Secondly, we don't know who this person is and whether it is just some angry neighbor who didn't like the way his dog walked across his yard. We don't know that. That's really not corroboration because it was not current, that we know; nothing to rely on.

The majority of the affidavit is the information from the alleged informant and I think Aguilar/Spineili requires it to be stricken; that the magistrate is not entitled to rely on — on it's face in reviewing the affidavit because there is no established reliability of that individual.

To supplement the facts alleged the affiant stated that the defendant had a known association with manufacturers of Methamphetamines. Again, that makes one wonders what that term means. It's almost as though, in America, if you get caught with something, you are always guilty for it. I don't think that's the way this country is and I don't think that's the state of the law just because something took place four and a half months prior, is there an assumption that is happening, now? I think not.

Real important factor that probably more of a conclusion is that the August 4th search is — there is an assumption by the affiant and an assertion by the People just of what took place on August 4th, it's very likely still it's taking place in December.

And, of course, I may be in great conflict with our Supreme Court, now, as to what is probable cause; but it seemed to me equally likely that a person who had his house raided a few months before might not even live there. The interesting thing is that nowhere in the affidavit is there any showing of any current information that the defendant still resided at 1799 West 28th Street on December 14th.

Four and a half months could have easily been enough time for someone to move. Perhaps the affiant knew but it wasn't alleged. I don't think it is reasonable to assume that, and fortunately it did not happen in this case, but could easily have happened that someone else lived there and that same individual who just happened to move in the neighborhood got his house searched for no reason.

There is nothing current in that affidavit, affiant's affidavit, nothing; and when deciphering the information, there is no fact that the defendant's doing anything.

But, furthermore, the requirement of the law is the affidavit be specific, the search warrant itself be such; that the affiant offer the Court, the magistrate, such sufficient facts to show to the magistrate with

reasonable certainty. Make it more probable than not, that the items sought to be seized will be on the premises sought to be searched.

There is no discussion why anyone thinks that there are narcotics on the premises except the legal language routine which is the experience of the affiant that people who manufacture tend to store them in their homes.

There is no allegation that the person who allegedly owned the premises to be searched have been doing any manufacturing with any current time frame. So, even if the Court considers that is a fact, which I have been taught, concludes, aren't facts. There is no showing it's happening at this time. Nothing, unless reliance is placed on what was found in August, four and a half months prior. The People made no effort to establish or to take the taint off this stale information.

I think on its face, the affidavit was insufficient and I think the testimony of the affiant today in this Court makes it clear he did not, in his affidavit, comply with legal requirements for establishing the reliability of an informant and, therefore, all of that must be excised. There is nothing left.

Thank you.

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The affiant also alleged that he had conducted an interview with the defendant herein subsequent to his arrest wherein the defendant made certain incriminatory admissions. Again, the affiant did not specify a date when this interview occurred, and this defendant intends to show at the time of hearing on these motions that said interview took place on September 24, 1981, and therefore was over three months old, and subject to be excised as "stale information" . . .

Q. BY MR. MORRISSEY: Do you recall how long before your interview of September 24th that was? . . .

Q. BY MR. MORRISSEY: And then that occurred on the 24th of September?

A. Yes, it did.

FN 145

As noted above, the facts presented to the magistrate must tend to show that the property to be seized will be present at the time of issuance of the warrant at the property sought to be searched. Both Federal and State Constitutions require recent information. *Sgro v U.S.*, 278 U.S. 207, 210 (1932); *People v Mesa*, 14 Cal. 3d 466 (1975); and *Alexander v Superior Court*, 9 Cal. 3d 387 (1973). From the foregoing authorities,

it appears that what determines staleness is largely left to a case-by-case analysis. If the probable cause was secured within 15-days, the warrant will probably sustain scrutiny. If it is from 15 to 30 days old, the court will look carefully at what items are being sought, and generally give the defendant the benefit. If the information is older than 30-days, however, the prosecution generally has a difficult burden in justifying the warrant. In the instant case, the information regarding the Sagebrush Trails residence clearly was over 30-days old, and therefore should be excised from the warrant as being stale, and further as not tending to establish any facts which would lead the magistrate to believe that there was a crime occurring at the 28th Street address.

FN 146

Regarding the second search warrant for 28th Street, defendant says there was no probable cause for its issuance. For example he said, the affiant did not even claim that Morton still lived at the house. On the second page of the affidavit affiant says that in view of both the recent information he has obtained and Morton's known association with the amphetamine business, additional evidence "may be found at his 28th Street home." That is equivalent to saying that he lives there, which is a statement of fact. *People v Superior Court*, 49 Cal.App.3d 160, 166-167. A summary of the affidavit is contained in the discussion of defendant's next point (that the information is largely stale) and is self-evidently sufficient for probable cause under the applicable standards.

Regarding staleness, one of the cases cited by defendant, *Alexander v. Superior Court*, 9 Cal. 3d 387, states at 393 that there are some limits but no clear cut rule to determine staleness. What is required is reasonable cause to think at the time the search warrant is sought that the property is at the specified place. If that is a reasonable conclusion from the affidavit, then the information should not be considered stale.

The affidavit states that the execution of a search warrant 4-1/2 months earlier disclosed the existence of a methamphetamine laboratory in Crestline; and subsequent to that search warrant a second one was served on Morton's house, disclosing evidence linking him to the methamphetamine business. The common sense inference from these statements is that evidence was also found at Crestline linking him to the business and was the reason for the search of his house.

Thereafter, he admits his involvement in the business to the affiant, who also hears from an informant that he (defendant) is still dealing in the stuff.

Then, on the day the search warrant at issue is issued, the affiant

receives more current information from another informant. He said that eleven days ago he bought 1/4th gram of methamphetamine for openers, as it were, from a man with whom he had an agreement to buy 2-4 ounces today, that two days ago he met with this man to confirm today's buy, that during their meeting, the defendant Morton arrived with a baggie of white powder which he said he had just finished processing, that Morton told the man that the "stuff" he (the man) needed for Monday (today) was ready, that the man told Morton that the informant was the person who was going to buy the methamphetamine on Monday, and that he (the informant) has heard the man speak of Morton previously as having good speed and coke and on one occasion as being en route to meet Morton to get some "stuff" to deliver to a certain bar.

The information in the affidavit clearly leads to a conclusion of continuing activity in the drug business by Mr. Morton. Consideration of the money to be made makes this conclusion all the more obvious. (Why quit a money making operation?) Continuing activity negates staleness. (See *People v. Thompson*, 89 Cal. App. 3d 425, 428-430.)

FN 147

Q. Other than that information which, again — well, strike that.

Other than the information with respect to that you received from the informants alleged therein, you had no current information as to any activities taking place or allegedly taking place in the subject residence, did you — perhaps I should rephrase that.

You did not put any such information in the affidavit, did you?

A. That's correct.

Q. Was there any testimony given before the magistrate, when you appeared, to have the search warrant signed by the Judge?

A. Not to the best of my knowledge or recollection.

FN 148

CROSS-EXAMINATION

BY MR. MORRISSEY:

Q. With regard to the date of the information from this unproven informant, your affidavit does state, does it not, that it was subsequent to the service of the first warrant?

A. That's correct.

FN 149

REDIRECT EXAMINATION

BY MR. SMITH:

Q. Detective Perry, in making reference to — subsequent to August 4th, the period of time between the first search warrant on the 28th Street residence and the second one that was approximately, what, three and a half months?

A. Approximately.

Q. So it could be the day after?

A. It wasn't.

Q. But it could have been?

A. No, it couldn't have been.

Q. That language does mean that?

A. The language could mean that.

Q. But that's all you gave the magistrate, isn't it?

A. That's true.

FN 153

XII.II

THE AFFIDAVIT IN SUPPORT OF THE SEARCH WARRANT CONTAINS NUMEROUS ALLEGATIONS OF FACT ALLEGEDLY DERIVED FROM INFORMATION RECEIVED BY INFORMANTS, WITHOUT ESTABLISHING THE CREDIBILITY OF SAID INFORMANTS, AND THEREFORE, SAID INFORMATION MUST BE EXCISED FROM THE AFFIDAVIT.

The first informant to whom the affiant made reference was designated by the affiant himself as "an unproven informant". When coupled with the fact tht there was no date when that information was provided to the affiant, it becomes clear that this informantion was obviously unsubstantiated hearsay from an unreliable informant and, as such, fails to meet the "two-pronged" test established by the United States Supreme Court in *Aguilar v. Texas* 378 U.S. 101 (1964); and *Spinelli v. United States*, 393 U.S. 410 (1969). By the affiant's admission, a lengthy analysis of the above-referenced cases is unnecessary. This defendant anticipates that the prosecution will argue that although said informant was "unproven" his information can be used for purposes of corroborating the subsequent information acquired through the second informant discussed by the affiant. However, the defendant submits that absent some point of reference vis-a-vis the date the subject information was

acquired, it would seem illogical, absent testimony before the magistrate pursuant to *Penal Code* Section 1526, for the magistrate to arrive at such a conclusion. Furthermore, it was the affiant's burden to show that the information received from this unproven "informant" somehow corroborated the information subsequently received by the "reliable confidential informant".

**FN 154**

Although it appears that the informant gave certain information based upon personal knowledge, at no time does the affiant allege that the informant told him that the items to be seized would be found at any particular location. On the contrary, there is no allegation that the informant even knew where this defendant resided. From the Affidavit it appears that the affiant had only met this defendant on one occasion, two days prior to the issuance of the subject Warrant at a restaurant in San Bernardino. Therefore, the affiant failed to satisfy the first prong, commonly referred to as the "personal knowledge" prong, and therefore all information alleged by the affiant to have been received by the informant must be excised from the Affidavit.

In addition to failing to satisfy the first-prong of the *"Aguilar-Spinelli* two-pronged test," the affiant failed to allege facts which would justify the magistrate in believing that the informant was believable. In fact, there is not one allegation, other than the conclusion on the part of the affiant that the informant was reliable, to have led the Magistrate to determine that the informant was believable and/or trustworthy.

It is anticipated that the prosecution will argue that in light of all other facts alleged in the Affidavit, the informant should be deemed reliable because he is giving information about the alleged involvement of the defendant herein in illicit narcotics activities. Furthermore, it is anticipated that the prosecution will argue that the information given to the affiant by the informant was incriminating, and therefore reliable. However, if the informant had in fact been giving information to the affiant that was self-incriminating, it was the duty of the affiant to inform the magistrate of this fact. As is often the case, informants provide information to police officers for the purpose of avoiding prosecution for their own criminal activities, or as is equally common, for letters of recommendation from the respective police officers for purposes of sentencing when said informants may have been convicted of a crime.

**FN 155**

As appears from the testimony of the affiant subsequent to issuance

and service of the challenged Warrant, the "realiable confidential informant" had never been used by the affiant as a source of information, (R.T., June. p. 109, 8-10), but that the informant was being used by another sheriff's detective on another matter. (R.T., June. p. 109, 11-14.)

THE COURT: Would your answer be, sir, you put any information in the affidavit that would show the magistrate that you knew anything about this person?

A. That's not quite correct. I did state that the individual, to my knowledge, a reliable confidential informant.

Q. Did you state what knowledge you had?

A. No, I didn't state what knowledge I had.

Q. At the time you drafted the affidavit, were you aware of the case law requirements established in the credibility of an informant?

A. Yes.

FN 156

Defendent next claims that the credibility of the informants was not established. Affiant describes the first informant as unproven. Defendant argues that this informant is not corroborative of the second informant because the affidavit does not give the date when he (the first informant) gave his information. And defendant further states that it must be shown how the first informant corroborates the second. He is corroborative because he is another source of the same kind of information, namely, that Morton is still in the drug business. The date of his information is unimportant. It is sometime between the two search warrants, and that is sufficient.

FN 158

MR. SMITH: The Stewart case really is very different here. We got an informant who gave precise details as to items in question, as well as firsthand information corroborating the presence of items in the defendant's garage and home. Real important stuff. There is no mention about this alleged information where this defendant resided.

Also, that the police were aided by an informant who had proven himself to be reliable in the past, assisting in several cases. That's the whole point. We also have discussion of statement against the person's penal interest. There is no showing of that.

And probably this informant that the affiant was using wasn't making statements against his penal interest. The informant or the witness used worked outside of the scope of their work and when advising the Court

perhaps someone should get them and the attorney who asked them and they used the Fifth Amendment Privilege. The officer came in, no problem. They aren't going to be prosecuted and I think this is possibly the case.

I think it's against his penal interest. It's not in evidence and that's what we are dealing with. I don't think it's reasonable to assume that it was against his penal interest as it is to assume that it was not based upon common sense, that he would have us view it.

**FN 161**

AFFIANT'S EXPERIENCE: Your Affiant attests that he is now, and has been duly sworn Deputy Sheriff in the County of San Bernardino, State of California, since July 6, 1974. Since February 26, 1979, I have been assigned as a Detective in the Sheriff's Narcotics and Selective Investigations Division. During that period of time I have been assigned to the Narcotics and Selective Investigations Division, I have participated in numerous Search Warrants pertaining to illicit manufacture of various controlled substances, including, but not limited to, Phencyclidine (PCP), Methamphetamine, Hashish, Amphetamine, and Heroin. I have participated in numerous Search Warrants pertaining to possession for sales of all the aforementioned controlled substances numerous other forms of controlled substances, including their manufacture, use, possession and transportation.

It has been your Affiant's experience that subjects involved in the illicit manufacture and /or possession of narcotics often hide these substances and paraphernalia for manufacture in their homes, on their persons, and in their vehicles. Further, it has been my experience that involved subjects also possess in their homes, vehicles, and in their persons, narcotics formulas, business ledgers pertaining to narcotics transactions, and other documents tending to identify other persons involved.

**FN 162**

It has been your Affiant's experience that persons involved in trafficking and manufacturing narcotics often use false names and addresses to hide their identities and illegal businesses. Telephone toll information is often crucial in successfully investigating such criminal activity.

It has also been my experience that persons involved in the illegal manufacture of controlled substances often possess false identification, operate vehicles registered in names other than their own, use intermediaries to conduct their illegal business, use post office boxes, and use

false physical addresses to conceal their true identities and physical locations.

FN 163

WHEN AN AFFIDAVIT IN SUPPORT OF A SEARCH WARRANT CONTAINS CONCLUSIONARY LANGUAGE, THE SAME MUST BE SUPPORTED BY FACTS PRESENTLY IN POSSESSION OF THE AFFIANT IN ORDER FOR SUCH LANGUAGE TO HAVE ANY EVIDENTIARY VALUE.

Under the section entitled "Affiant's Experience" the affiant provided the magistrate with four paragraphs, only one of which appears to have any relevancy in making a determination whether the affidavit contained sufficient facts to constitute probable cause. The first paragraph under "Affiant's Experience" is a synopsis of the affiant's experience as a Deputy Sheriff in the County of San Bernardino and provides the magistrate with some understanding of the affiant's expertise. The second, third, and fourth paragraphs consist solely of conclusionary language regarding the affiant's experience with subjects involved in the illicit manufacture and/or possession of narcotics. Nowhere within these paragraphs, or within the entire Affidavit itself, are there facts which would tend to confirm the conclusions of the affiant with respect to the residence of the defendant on December 14, 1981. Specifically, the affiant does not allege that he had any information that any narcotics might be at the 28th Street residence, or that during the August 4, 1981 search at the 28th Street residence any particular business ledgers, etc., were recovered, and in all likelihood they would be recovered again.

Paragraphs 3 and 4 made reference to the affiant's experience with regard to false names and addresses and false identifications used and/or possessed by persons involved in the illegal manufacture of controlled substances. Within the entire Affidavit there is not one scintilla of evidence which would tend to indicate that the defendant may be in possession of evidence of the use of false identifications, false names, or the registration searched.

There is no discussion why anyone thinks that there are narcotics on the premises, except the legal language routine which is the experience of the affiant that people who manufacture tend to store them in their homes.

There is no allegation that the person who allegedly owned the premises to be searched have been doing any manufacturing with any current time frame. So, even if the Court considers that is a fact, which I have been taught, concludes, aren't facts. There is no showing it's

happening at this time. Nothing, unless reliance is placed on what was found in August, four and a half months prior. The People made no effort to establish or to take the taint off this stale information.

FN 164

Still on the question of probable cause for the second search of Morton's 28th Street house, defendant next contends that an officer's opinion regarding the propensities of those in the narcotic and drug business must, to be worth anything, be corroborated by facts presently known to the officer indicating that the opinion is accurate in the case at hand.

No authority is cited for this proposition, and it appears to confuse the notion of probable cause with proof of the case.

FN 165

*People v. Johnson*, 21 Cal.App.3d 235, approves consideration of expert opinion in deciding probable cause for issuance of a search warrant.

FN 166

In view of the previously productive search of defendant's house and the subsequent evidence of continuing activity, it hardly takes an expert opinion to conclude that another search may be productive also.

FN 168

As referenced above, even if the magistrate had correctly determined that all of the facts alleged within the subject Affidavit were properly submitted for his consideration, and that the same were relevant for the purposes of a probable cause determination, the Affidavit does not contain facts sufficient to establish two elements essential to the validity of the Search Warrant issued by the magistrate, when his determination was made solely upon the Affidavit in Support of the Search Warrant. The first element missing from the Affidavit is some form of representation by the affiant, by way of personal knowledge or other acceptable evidence, that the defendant herein was residing at the 28th Street residence on December 14, 1981. It appears as though the affiant assumed that because a Search Warrant had been served at the residence on August 4, 1981 and that the defendant was residing at that location at the time, that the defendant would still be residing there some

four and one-half months later. If the affiant truly had facts sufficient to justify probable cause for the belief that the defendant was involved in some illegal activity, it would seem a simple task to confirm whether the defendant did in fact reside at the property to be searched.

Secondly, another essential element missing from the Affidavit is some evidence tending to show that any of the property to be seized would be located at 1799 West 28th Street on December 14, 1981. Nowhere in the Affidavit is there to be found any specific and articulable facts which would justify in determining that the property to be seized might be located at the property to be searched. Other than the conclusions of the affiant regarding the general behavior of persons who manufacture and/or distribute controlled substances, there is not a single allegation that the defendant did in fact possess any of the specific property to be seized within the premises located at 1799 West 28th Street at any time reasonably close to the date of issuance of the Warrant.

**FN 170**

Items not listed in the Search Warrant, exceeded their legal authority, (R.T., June, p. 147, 13), but that the officers had not acted in bad faith. (R.T., June, p. 147, 5-8). Clearly, from the cases delineated above, and their progeny, bad faith on the part of the officers is not an issue. On the contrary, the officers seeking to seize items not listed in the warrant must be *presently aware of some specific and articulable facts from which a rational link between the items seized and the criminal behavior can be inferred. Hill, supra,* at 763.

Upon argument from defense counsel that the officers in effect had been given a carte blanche to conduct an exploratory search, and that that was simply not the state of the law, the deputy district attorney conceded the point. (R.T., June, 148, 9-14). However, the judge, upon preliminary examination, still upheld the search, thus admitting all of the evidence seized pursuant to the warrant.

A thorough reading of the testimony of Detective Hankerson during the June, 1982 preliminary examination clearly establishes that at the time the officers seized the items not specified in the warrant, they were not presently aware of any specific and articulable facts from which a rational link between the items seized and criminal behavior could be inferred. On the contrary, Detective Hankerson testified that most of the items which reportedly were determined to have been stolen were not verified as stolen until one and two days following the search of the subject residence. In addition, it appears as though the officers simply went through the residence seizing various items not specified in the

warrant and running records checks on the various items to make determination whether they were stolen. Furthermore, it is well established law that the California courts can provide greater than that afforded by the United States Constitution, but at no time can they limit the protection afforded by the United States Constitution. Therefore, based upon the holding in *Warden v. Haden, supra*, adopted by our own Supreme Court in *People v. Hill*, it was incumbent upon the officers at the time they seized the items not specified in the warrant to be presently aware of some specific and articulable facts from which a rational link between the items seized and criminal behavior could be inferred. Clearly, there was no such link, and the testimony of officers that drug dealers are generally armed, or the argument of counsel for the People that "it makes common sense to conclude that a dope dealer and manufacturer having possession of about 20 weapons is probably engaged in some criminal activity" clearly does not meet the Nexus requirement of the United States Supreme Court and our own California Supreme Court.

Although this defendant is of the opinion that the August 4, 1981 Search Warrant executed at his residence located at 1799 West 28th Street in the City of San Bernardino should be quashed on the grounds that the Affidavit in Support thereof did not contain facts sufficient to constitute probable cause, this defendant also submits to this Honorable Court that the items seized pursuant to the warrant that were not specifically described within the warrant were items seized pursuant to a general exploratory search of the defendant's residence, conducted pursuant to a narrowly drawn warrant . . . .

(MR. SMITH:) . . .

Secondly, I suggest that the search, the scope of the search at the 28th Street residence clearly exceeded the scope of the warrant.

The warrant is specific. It describes items sought to be seized, certain chemicals, narcotics themselves, paraphenalia, items tending to show ownership and possession, control over the residence and so forth, usual kind of language.

But at the time the officers searched, it took approximately nine hours — which is testimony. I've cited it — and in essence, emptied out the house. They took silverware, television sets. They took guns, about 57 of them. None of these items were obviously contraband. A gun in and of itself is certainly not obviously contraband. To come in and remove guns to a certain location within a house or keep the defendants out of the location of any weapons certainly is reasonable. To pick things up, to take them, to take possession and control of them and to run serial numbers on them, to make a determination whether they're stolen is

clearly not within the scope of the permissible search. There was nothing in the affidavit about any stolen goods.

Yet it's also very clear from the transcript and the testimony that the officers had every intention of coming in there and literally cleaning out the house. And it took them nine hours to do it. And many of the items they seized never were shown to be stolen, never were shown to be contraband in any way. In fact, some of the alleged items of contraband, allegedly stolen handguns, didn't show up as being stolen until the next day or two after they actually searched the premises.

But what gives them a right to go beyond the scope of the search warrant, unless it's obviously contraband?

And then I don't think anybody can argue about that. Automatic weapons are prohibited. If there was an automatic rifle standing in the corner and someone had sufficient expertise to spot it and know what it was, I think he's justified in grabbing it as contraband, because the average citizen is not allowed to own it. A handgun is not.

Judge Kennedy, during the preliminary hearing, said that if there is a discovery of that many guns in a single person's residence, then that may be evidence that something is wrong.

I considered seriously of bringing my father-in-law in to testify. He's a former treasury agent, and also happens to be a gun collecter. He's a pistol shooter and competes all over the country. He has a lot more guns than here. And I don't think anyone would suggest, because of that, he might be a criminal and someone would be able to take all those things out of his house.

So under warrant, without any facts supporting why any items sought to be seized might be there, the warrant specified certain things to be taken. Not one of the items taken, other than obvious contraband — guns, motorcycles, et cetera, silverware, a surveyor's transit, phone answering machines, none of those items were obviously contraband.

I cannot see for the life of me how a surveyor's transit is obviously contraband, how a phone answering machine is obviously contraband. I don't know any of the machines that speak for themselves and say "I'm stolen" if somebody gets near them. That clearly exceeded the scope.

The United States Supreme Court began the doctrine in 1971, and California has clearly adopted it. I think right now we have a case where that issue will be litigated, where a search of a lawyer's office was conducted trying to find some evidence of a lawyer's involvement in some criminal conspiracy. And instead of going to the alleged files — or the files which allegedly contained incriminating information, the officers making the search just took everything. And then they went to his home and took everything. They took all of his files.

Now, we all know that a client holds a privilege, the attorney-client privilege. So clearly there was a violation there.

It's the same thing here. If someone had — even if we give that the officers had probable cause, which I can't see how they did, or that the magistrate could find probable cause for the issuance of that warrant, how was it, then, that the officers were empowered, based upon the limited scope of this warrant, to do what they did? They took a whole lot more than was described, and none of it was obviously contraband.

The cases began to delineate a pretty hard and fast rule. And that was that when officers go to a residence pursuant to the issuance of a search warrant, the scope of which is clearly defined, and seek to take an item, or seize an item that is not described in the warrant itself, they must at that time know, meaning they must presently be aware, of some specific and articulable facts that tend to link that particular item to be seized to criminal conduct.

I don't think there's ever been an offer of proof that anyone suggested that anybody had that in mind. Because no one knew anything about the defendant. If they did, they would have had it in the affidavit at the time. But they didn't.

They didn't know who he was. And they didn't know whether he was raising chickens and goats, or whether he was a gun runner to Afghanistan. They didn't know. So they couldn't have had that kind of information. That is the law. That's what the courts tell us.

Upon making a determination on this issue in the companion case, SCR 38968, the Court found that probable cause was supported by evidence found at the Lake Gregory residence. But there wasn't any argument about the officers exceeding their scope of the permissible search. And I think the Court just has to find that they did. There's nothing there that jumped out and said it was stolen, it was clearly stolen.

I think to come into my home and find a gun laying on my dresser and take it out of my house when you have a warrant to find Joe Blow, who's on the lam, and take it out and run a hot sheet check on it to see if it's stolen, it exceeds the scope. The cases tell us it does. I believe that's what we're governed by.

The total number of items seized was 122, the majority of which do not relate to contraband. There was contraband found allegedly, but that argument goes back to what did they show the magistrate to make him believe it was more likely than not that it would be there. It's conclusions. That's all.

Finally, probably my — one of my best arguments that I've got here with respect to the officers exceeding their scope is a quote by the District Attorney found in the reporter's transcript of June, page 147,

line 13, where he agreed that the officers exceeded their scope, seizing items that weren't listed in the search warrant, that they exceeded their legal authority.

Gosh, I'd like that to be considered in support of my argument here, that any of those other items just clearly have to be — even if the Court were to find probable cause, any of those other items have to be set aside; they can't be used.

I think also — and I make reference to it, but I think probably it would require a thorough reading of his testimony — the affiant in this particular affidavit, Detective Hankerson, during the course of his testimony, made it clear that he really didn't know any particular facts. He had no present knowledge of any specific and articulable facts which would give him some rational belief that the items sought to be seized, to wit, a handgun, a television set, a stereo, et cetera, was somehow related to criminal conduct, was somehow contraband. There's never been an offer of showing to that effect.

And as I said earlier, the District Attorney appears to have agreed with me. It clearly exceeded the scope. So perhaps I won't go on too much more, unless perhaps he's changed his mind.

FN 171

Q. BY MR. MORRISSEY: — that you found a pistol that you, as a San Bernardino Policeman, determined was stolen before you left the premises on December 14th?
A. Yes, sir.

FN 172

(MR. McCORMICK:) . . .
Q. Now, a pistol was seized that was later determined to be stolen. That weapon was brought to your attention?
A. Yes, sir. I located the weapon.
Q. Did the serial numbers on that weapon, had they been tampered with or defaced in any manner?
A. I don't believe so, no, sir.
Q. Do you have any personal knowledge that that weapon was stolen?
A. No. Just what I was told by other officers at the scene.
Q. Did you or any of the other officers have a police report that reflected that gun was stolen?
A. No, not in our possession. I don't — I believe there was a stolen report on file out of Victorville, but we didn't have it in our

possession.

Q. Prior to entering Mr. Morton's house, were you aware of that report out of Victorville?

A. No, sir.

Q. Did someone have to pick up and examine the gun to run the serial numbers through the computer?

A. Yes.

Q. Do you know who ran the check on the weapon to see if it was stolen?

A. It was a San Bernardino police officer, but I don't recall who ran the check.

FN 174

THE COURT: Back on the record. Okay. The record will show all the parties and attorneys are present

MR. MORRISSEY: Your Honor, I have, during the recess, gone down to the Crime Laboratory and obtained an additional crime lab report that was signed by Mr. Kellett, and says he did the analysis on September 23rd of last year. That this item number 3, one vial of it was examined and found to contain methamphetamine. And then as I previously mentioned, one vial, number 10, was examined and found to contain methamphetamine. And Mr. Kellett is on vacation, but one of the other criminalists, Lightfoot, examined his notes, and said that it appears to him that three and ten are not duplicatory, and it appears there are two vials of each. And they had separate weights assigned to them, but I can't remember what they are.

FN 175

THE WITNESS: It was secreted behind the stereo, in a cabinet with no doors or other means of gaining entrance to the cabinet except by removing the stereo components, along with several other handguns.

FN 176

The second warrant authorized an intensive (sic) search.

FN 177

Therefore, the officers were entitled to be all over the place and could seize whatever stolen property they discovered and verified prior to leaving the premises.

FN 178

A lot of guns were seized, but defendant is being prosecuted for only one of them which was verified to be stolen prior to leaving the premises.

FN 179

(MR. SMITH:)

Q. Well, did you have information that you believed there might have been some stolen property there?

A. That was not the intended search.

FN 180

(MR. SMITH:) . . .

Q. But upon your inspection, when you had the gun in your hand, there was still nothing to indicate that it was stolen?

A. Yes, prior to my handling it in my hand, behind the stereo.

Q. By the location of it?

A. By the location of it.

FN 181

A. It did have serial numbers. I noticed that.

FN 182

Q. Did the serial numbers on that weapon, had they been tampered with or defaced in any manner?

A. I don't believe so, no, sir.

FN 183

Q. Had you read any reports indicating that particular handgun might be stolen?

A. No; numerous reports of numerous handguns being stolen, not that handgun until after I examined it.

FN 184

Q. The gun in question, the one Mr. Morrissey has been asking you about, the one for which the charge has been found. At the time

you first seized and gained possession of that item, it was just another gun, wasn't it?

A. Yes, it was just another gun.

Q. Other than your speculation that it might be stolen, you had no specific articulation facts at that moment that would link that gun to some criminal conduct, did you, that specific gun?

A. That specific gun, no.

FN 195

XV

## THE ALLEGED ADMISSION OF THE DEFENDANT CONTAINED WITHIN THE AFFIDAVIT IN SUPPORT OF THE SEARCH WARRANT FOR THE DECEMBER 14TH, 1981 SEARCH OF THE 28TH STREET RESIDENCE WAS TAKEN IN VIOLATION OF THE DEFENDANT'S *MIRANDA* RIGHTS AND, THEREFORE, MUST BE EXCISED FROM THE AFFIDAVIT.

As discussed above, the affiant alleged in his Affidavit in Support of the Search Warrant for the December 14, 1981 search of the 28th Street residence that he had conducted an interview with this defendant subsequent to his arrest (August 4, 1981, "wherein he admitted his participation in a conspiracy to distribute Methamphetamines and association with SEAN FAHY, a wanted fugitive and manufacture (sic) of controlled substances."

One of the principal objectives of the *Miranda* decision was to establish safeguards that would liberate Courts as much as possible from the often cumbersome necessity of deciding in each case whether coercive influences, psychological or physical, had been employed to secure admissions or confessions. (*See also People v. Fioritto*, 68 Cal.2d 714 (1968.) Therefore, the *Miranda* Court held that prior to any in-custody questioning, a suspect must be warned in clear and unequivocal terms:

(a) That he has a right to remain silent;

(b) That any statement he does make may be used as evidence against him;

(c) That he has a right to consult with and have present prior to and during interrogation, an attorney, either retained or appointed; and

(d) That if he cannot afford an attorney one will be appointed for him prior to any questioning, if he so desires.

The California Supreme Court has held that each of these forewarnings must be given, and it is insufficient to give some but not all of them. (*People v. Fioritto, supra.*) The *Miranda* Court noted that without the protection flowing from adequate warnings and the right of counsel, all of the safeguards built around the giving of testimony, whether by an accused or any other witness, would become empty formalities in a procedure where the most compelling possible evidence of guilt, a confession, would have already been obtained at the unsupervised pleasure of the Police.

Furthermore, the *Miranda* Court clearly delineated that no amount of circumstantial evidence that a suspect may have been aware of his rights would be sufficient to stand in the place of adequate warnings of these rights.

Prior to the *Miranda* decision, the United States Supreme Court decided *Escobedo v. Illinois*, 378 U.S. 478 (1964), wherein the Court dealt with the duty of the Police to inform a suspect of his rights under the privilege against self-incrimination and the corresponding right of the suspect to be so informed. In *Escobedo*, the Court decided that the inception of the duty of the Police to warn a suspect of his rights under the privilege against self-incrimination occurred when the investigation was no longer a general inquiry into an unsolved crime but had begun "to focus on a particular suspect," with the suspect having been taken into Police custody, and the Police carrying out a process of interrogation that lent itself to eliciting incriminating statements. The Court explained that when the focus is on the accused for the purpose of eliciting a confession thus shifting the process from investigatory to accusatory, our adversary system begins to operate. (*See also People v. Dorado*, 62 Cal.2d 338 (1965.) The *Escobedo* Court determined that the accusatory stage is reached on the occurrence of three circumstances:

(a) The investigation is no longer a general inquiry into an unsolved crime, but has begun to focus on a particular suspect;

(b) The suspect has been taken into Police custody; and

(c) The Police carry out a process of interrogations that lends itself to eliciting incriminating statements. (*See also People v. Tahl*, 65 Cal.2d 719 (1967), cert.den. 389 U.S. 492.

In *Miranda*, the Court determined that the inception of the duty to warn was reached when "custodial interrogation" begins and defines custodial interrogation as questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. (*See also People v. Fioritto, supra*) Under *Miranda*, custody occurs, so as to bring the duty to warn into play, if the suspect is led to believe, as a reasonable person,

that he is being deprived of or restricted as to his freedom of action or movement under pressures of official authority. (*See also People v. Hazel*, 252 Cal.App.2d 412 (1967). The effect of noncompliance with the duty to warn makes a statement obtained by the Police inadmissible, not only when said statement may go to the guilt of the accused, but also when said statements may be merely exculpatory. (*See also People v. Thomas*, 12 Cal.App.3d P. 1102 (1970.)

In the instant case, the defendant submits that the statements alleged to have been made by him, designated as an admission by the affiant, was elicited from him while in the affiant's office without the defendant having been properly advised, nor knowingly, intelligently and expressly waiving said rights.

FN 196

In *People v. Giovannini*, 260 Cal.App.2d 597 (1968) the Court held that whether a person is in custody at the time of investigation depends not upon the interrogator's subjective intent but upon whether the subject, by virtue of his situation, reasonably believes his freedom of movement is restricted by pressure of his physical authority. The Court further determined that it was not necessary for a person to be under arrest for him to be in custody, and even one who would come to the Police station voluntarily may be regarded as being in custody.

FN 197

MR. MORRISSEY: It's my argument that if he is not in custody, then the Miranda does not apply.

THE COURT: Well, Miranda still applies even if they are not in custody. If he's focused with suspicion, under investigation and subject to imminent arrest, it's my understanding that the Miranda does apply.

MR. MORRISSEY: Miranda applies if he's in custody or could reasonably think —

THE COURT: Sure.

MR. MORRISSEY: — that he's in custody.

FN 198

The most obvious thing to me here is the lack of custody and the lack also of the defendant — possibility of the defendant reasonably thinking that he's in custody.

FN 200

In this case, we have simply the defendant's offhand and quick remark that: "Yeah, no problem with that," when asked if he was advised and understood his Rights. I think that, of course, while there could be obviously stronger evidence of waiver, that a remark like that is certainly indicative of the fact that he knows his Rights and is willing to talk.

FN 201

DIRECT EXAMINATION

BY MR. MORRISSEY:

Q. You are a San Bernardino County Sheriff's Detective?

A. Yes, sir.

Q. On the 4th of August of 1981, you assisted in the execution of a search warrant at Mr. Morton's home on 28th Street?

A. Yes, sir.

Q. BY MR. MORRISSEY: In connection with being there, did you advise him of his Miranda Rights?

A. Yes.

FN 202

THE WITNESS: Donald G. Hankerson, H-a-n-k-e-r-s-o-n.

BY MR. MORRISSEY:

Q. You are a San Bernardino County Sheriff's Detective?

A. Yes, sir.

Q. Did you assist on August the 4th of '81 in the execution of a search warrant on Mr. Morton's 28th Street home?

A. Yes, sir, I did.

Q. And sometime shortly thereafter, did you get a telephone call from Mr. Morton?

A. Yes, sir.

Q. Do you recall approximately when that was?

MR. SMITH: I'm going to object; it's irrelevant.

THE COURT: Overruled, foundational.

You may answer.

THE WITNESS: Approximately a week later.

FN 203

CROSS-EXAMINATION

BY MR. SMITH:

Q. Detective Hankerson, was that particularly — or was the phone call and interview tape recorded?

A. No, sir.

Q. Did you write an incident report about it?

A. No, sir.

Q. Do you recall whether this — strike that.

MR. SMITH: Nothing further. Thank you.

THE COURT: Thank you, sir.

MR. MORRISSEY: Nothing further.

MR. SMITH: I'm sorry. I do have one last question, if I may, Your Honor.

THE COURT: Fine.

Q. BY MR. SMITH: Do you recall the date this meeting took place at your office?

A. No, sir, I don't know the exact date.

THE COURT: You said it was a week later or a week or so?

THE WITNESS: Approximately a week or so.

Q. BY MR. SMITH: What do you base that guess on?

A. He was out. He was out of custody on his own at that time.

Q. I'm not sure I understand.

A. When he came down to talk to us — the night that we had arrested him, he was in custody at that time; and he was out on bail, I assume, when he came down to talk to us and it was just a short time later. I don't know the exact date. I would say in approximately a week's time.

Q. Did you make any notes about that interview?

A. No, sir.

Q. So you have nothing better than just unrefreshed memory of some time and place, somewhere a couple of years ago or year and a half.

A. Well, I know where it took place, but not the exact day.

Q. Do you recall if you read him his Miranda Rights?

A. No, sir, I didn't because we never got into talking.

FN 204

LOUIS PERRY, recalled as a witness by the defendant, having been previously sworn, testified further as follows:

THE COURT: Detective Perry, you have been previously sworn. Just have a seat.

Mr. Morrissey.

DIRECT EXAMINATION

BY MR. MORRISSEY:

Q. In September of 1981, did you call up Mr. Morton and ask him to come down and talk with you concerning this case?

A. Yes, I did.

Q. And —

MR. SMITH: I'm going to object as vague as to time.

THE COURT: September?

MR. SMITH: September?

MR. MORRISSEY: September, 1981.

MR. SMITH: Any particular day?

Q. BY MR. MORRISSEY: Do you recall how long before your interview of September 24th that was?

A. No, I don't; short time.

Q. And do you remember anything about what you asked him on the phone?

A. Asked him if he would be interested in coming down and talking to me about the charges against him and about the case in general.

FN 205

Q. Now, when he came in to the office, then, what, if anything, did you say to him about his Miranda Rights?

A. I asked him if he recalled being advised of his Rights and if he fully understood those Rights and he said that he did, there was no problem with that.

FN 206

Q. Somewhere towards the end of that conversation, did he make a remark about his ability to get up and get out of there, if he wanted to?

A. Yes.

Q. Do you recall what he said or the substance of what he said?

A. Something to the effect that if he hadn't intended of cooperating, he wouldn't have come down to start with and that he understood that he was free to leave at any time.

FN 207

CROSS-EXAMINATION

(BY MR. SMITH:)

Q. You are familiar with the decision of Miranda vs. Arizona?

A. Yes.

FN 208

Q. BY MR. SMITH: I believe your testimony is that you contacted Mr. Morton by telephone prior to the September 24th meeting?

A. May have been on the date of the 24th. It was just prior to him coming down.

Q. That's the only time that you contacted him?

A. No, I contacted him on the phone probably a total of about four times.

FN 209

Q. Did you know if anyone else did from your office?

A. I would be completely unaware.

Q. So it's possible, isn't it?

A. Anything is possible.

Q. You don't know if you were the only one contacting him, do you?

A. No. Well, I know I wasn't. I know Detective Hankerson and/or Rucker had contacted him previously and he had in fact been to the office on prior occasions.

FN 210

Q. Do you know that criminal charges had been filed as of the 24th of September?

A. I believe they had. I had just gotten the case assigned to me at that time. I believe it had already been filed.

Q. Even if they hadn't, you knew that they were going to be, didn't you?

A. Yes.

FN 211

Q. So you knew you had an individual that either wasn't or was to

be a defendant in criminal proceedings?

A. That's correct.

Q. And that any admissions or statements he might make probably be used against him; is that correct?

A. Yes, sir.

Q. You supposed that Mr. Morton was — well, strike that.

Was it your impression that Mr. Morton would have been there absent potential criminal proceedings?

A. I don't think I would have had contact with him at all had it not been a crime, had a crime not occurred.

Q. Well, let's assume for the moment that for some reason there wasn't going to be a filing, do you suppose Mr. Morton would have been in your office?

A. Well, I would assume that he would not have been.

**FN 212**

With regard to the advisal, the Court would find that there was not, at the September 29 - September 24 interview, there was not in fact a custody situation and there was not representation of record, as far as Mr. Morton was concerned.

**FN 213**

In short, I feel that the statements made were appropriate, properly utilized by the police authorities in connection with the affidavit and that would not need to be excised from the affidavit.